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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4726-13T3

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,

Plaintiffs-Respondents,

v.

NAVILLUS GROUP, A GENERAL PARTNERSHIP; JIM SULLIVAN, INC.; JAMES SULLIVAN, JR.; JAMES SULLIVAN, III; SANDRA LYONS-SULLIVAN; DREW A. SULLIVAN; and TERRI L. CLAY,

Defendants-Appellants,

and

ACCUTHERM, INC., and PHILIP J. GIULIANO,

Defendants.

Submitted April 28, 2015 - Decided January 14, 2016

Before Judges Nugent, Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1260-12.

Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., attorneys for appellants (Alan C. Milstein, of counsel and on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondents (Melissa H. Raksa, Assistant Attorney General, of counsel; Timothy P. Malone, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

NUGENT, J.A.D.

This is a Spill Compensation and Control Act (Spill Act) action. All defendants except Accutherm, Inc. and Philip J. Giuliano appeal from a May 16, 2014 order entering summary judgment against them for costs related to the remediation of the site of a former thermometer manufacturing plant in Salem County. Appellants contend the trial court erred by granting summary judgment despite genuinely disputed material facts as to whether they were innocent purchasers of the contaminated site and as to the damages. They also contend the trial court erred by finding the general partners of defendant Navillus Group, a General Partnership, liable for the judgment against it and by piercing the corporate veil of Jim Sullivan, Inc.

Having considered defendants' arguments in light of the summary judgment motion record and applicable law, we agree the court's decision to pierce Jim Sullivan, Inc.'s corporate veil is not supported by sufficient undisputed evidence on the motion record. We also agree there was insufficient undisputed evidence on the record to impose liability on defendants on a theory of unjust enrichment. Accordingly, we reverse and remand

for further proceedings as to these two issues. We otherwise affirm the summary judgment.

I.

We derive the following facts from the motion record. From approximately 1987 or 1988 until 1994, Accutherm manufactured laboratory-grade thermometers in a building located on a .41 acre tract in Franklin Township (the site).[1] Giuliano was Accutherm's CEO and sole shareholder. During the time Accutherm manufactured thermometers, mercury spills and discharges contaminated the site's building, ground, and groundwater.

The other defendants are members of the Sullivan family and two family-owned businesses (the Sullivan defendants). James Sullivan, Jr., is the father. James Sullivan, III, Sandra Lyons-Sullivan, Drew Sullivan, and Terri Clay are his children. Jim Sullivan, Inc., was incorporated in 1970 and the Sullivan siblings were either shareholders or employees when the events underlying this action occurred. Navillus Group is a general partnership formed in 1989 or 1990 for the purpose of holding and distributing the father's assets to the siblings. The

[1] The first amended complaint alleges Accutherm operated the manufacturing business from 1980 through 1992. Giuliano testified at a deposition that Accutherm began manufacturing thermometers at the site in 1987 or 1988. There are also discrepancies in the record as to whether Accutherm discontinued its operations in 1992 or 1994. The discrepancies are immaterial to the issues on appeal.

siblings were all partners when the partnership was formed and all signed the deed conveying the property to James Sullivan, Inc.[2] James Sullivan, III and Drew Sullivan purportedly withdrew in 1993.

The extent of the Sullivan defendants' knowledge of the site contamination and when they acquired their knowledge were central issues in the summary judgment proceedings. For that reason, we review the involvement of public agencies with the site.

In November 1987, the Gloucester County Department of Health notified Accutherm that tetrachloroethene and selenium had been detected in Accutherm's water supply. The Department's chief sanitary inspector required no immediate action but recommended "an alternative water source or treatment be considered for long term use" and installation of a water conditioner "if excessive staining of fixtures is a problem." The following month the Health Department investigated complaints from Accutherm's employees "concerning high mercury

[2] Plaintiffs assert in their brief that James III and Drew were "partners in Navillus but purportedly withdrew from the partnership in 1993. That "fact" is based on the Sullivan defendants' interrogatory answers. Plaintiffs also assert, however, that, James III "continued to conduct business on behalf of Navillus, and all four original partners signed a deed conveying the Property from Navillus to Jim Sullivan, Inc. in 2002." Because the Sullivan defendants do not discuss the apparent dispute in their brief, we do not address it.

blood levels." On December 30, 1987, a State industrial hygienist wrote a letter to a county health department employee, which stated, among other things: "I hope you are able to encourage Accutherm to promply [sic] evaluate and control the mercury exposure problem which it appears that they have." The hygienist also wrote: "[i]n addition to better biological monitoring, the company should do air monitoring and promptly evaluate and control the exposure sources. If housekeeping has been poor and spills have not been properly cleaned up, it is possible that much of the plant is contaminated."

The County reported the matter to the United States Occupational Safety and Health Administration (OSHA), which agreed to investigate. Several months later, in April 1988, a New Jersey Department of Environmental Protection (DEP) employee sent Giuliano a "Telegram Order" based on a site investigation. The investigation revealed Accutherm discharged industrial pollutants to its septic system. The letter demanded Giuliano immediately cease the discharge. Thereafter, County officials or agencies received many of the various letters and reports from the federal and state agencies that became involved with the site, as well as an environmental report prepared by the site's mortgage holder.

From April 1988 through May 1995, DEP sought to have Accutherm remediate the site. Its actions included: directing

Accutherm in June 1988 to contact the Bureau of Hazardous Waste Classification to arrange a site analysis; informing Accutherm in November 1994 of its obligation to comply with the Industrial Site Recovery Act; and issuing to Accutherm in April 1995 a "Directive and Notice to Insurers" requiring cleanup of the site.

Meanwhile, in August 1989, OSHA issued a citation to Accutherm for its willful failure to post a previous citation and provide respiratory equipment to its employees; and for its willful exposure of employees to mercury vapors. In April 1990, OSHA's Area Director wrote a letter to the Township's Mayor advising him of the "serious health threat" posed by the site's mercury contamination. The letter stated: "It seems that the possibility exists of an unsuspecting buyer or Franklin Township becomes saddled with the burden of this contaminated building, while the current owner escapes cleaning up the problem he created." The letter attached copies of OSHA's citations.

Accutherm filed a Chapter 11 bankruptcy petition in March 1994. In January 1996, the United States Environmental Protection Agency (EPA) assessed the site and issued a "Mini Pollution Report." The report identified the property as "Accutherm Inc., a former manufacturer of scientific thermometers," and noted "500 to 1000" thermometers were found intact in the building, along with a vial of mercury. The

report documented that a "[p]reliminary soil sample analysis indicated positive responses for 2 samples, however, the responses of 128 mg/kg and 4.2 mg/kg both fall well below the Emergency Removal Guidelines of 3100 mg/kg for industrial properties and 230 mg/kg for residential properties." Two areas sampled inside the building were above the DEP proposed contaminant level.

In a section entitled "Site Legal Status[,] Status of Site Cleanup[,]" the report's author noted: "None known to date[.]" In another subsection entitled "Past/Present Enforcement[,]" the author noted the State issued "Directive 1995 – 04 served to Insurers on 4/95 by [DEP] Responsible Party Cleanup Element[.]"

The report concluded with these paragraphs:

> Based on air monitoring results, the potential for exposure to Hg vapor outside the building does not exist. Soil sampling data indicates that, though Hg is present in two samples, it is well below the Emergency Removal Guidelines. In addition, the material does not appear to be distributed over the entire property.
>
> Air monitoring inside the building did not indicate that any significant levels of Hg vapor were present. Wipe sample analytical did result in locating two areas where Hg was present in concentrations greater than the NJDEP proposed contaminant levels. The building, however, appears to be structurally sound and secure, which greatly minimizes the possibility of a direct contact exposure to the material.

> Based on air monitoring, soil sample analysis, weight sample analysis and the condition and security of the building and surrounding property, the site does not present an immediate threat to human health or the environment.

In 1996 and 1997, and apparently through 2001 or later, the site was included in the State's list of "Known Contaminated Sites in New Jersey."[3] Although the list misidentified the street address, it identified the site as "Accutherm Incorporated." The Sullivan family became involved with the site in December 1999.

In the latter part of 1999, James Sullivan, III became interested in purchasing the property. When he inquired about the taxes, the tax collector told him there were outstanding tax sale certificates. In September of that year, the family partnership, Navillus, purchased 1994 and 1997 tax sale certificates from an entity in Florida.[4] Navillus purchased the certificates but paid the purchase price with a fund provided by

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[3] The publications in the record are for 1996 and 1997, according to their cover pages. The 1997 report has a handwritten notation on its cover page, "Official Published Report For Years 1997 to 2000[.]" The 2001 report has a handwritten notation, "Official Published Report for Years 2001 to 11/2005[.]"

[4] The record includes an amended assignment of the tax sale certificates. The amended assignment recites the purchase of the certificates by "Navillus Group, L.L.C., a Registered Limited Liability Company of the State of New Jersey, c/o Jim Sullivan Real Estate." The amended assignment was executed on February 2, 2000.

Jim Sullivan, Inc.[5] According to James III's testimony in another trial, he had conducted no investigation of the building or the property as of the date Navillus purchased the tax sale certificates.

James III had, however, heard "environmental rumors" about the site before he purchased the tax sale certificates on behalf of Navillus. He also signed a Tax Sale Bidder Information Sheet containing a statement that "industrial property may be subject to the 'Environmental Clean UP Responsibility Act,' the 'Spill Compensation and Control Act,' or the 'Water Pollution Control Act.'" James III certified he was not connected to a property owner or operator of such industrial property. And less than one week before the amended assignment of the first two tax sale certificates was executed, James III met with an attorney who informed him "it will be in your best interest to have an independent opinion as to the environmental soundness of this property." The attorney provided James III with the name of an environmental consultant.

James III did not retain the consultant. Rather, he thought the best course of action would be to contact the Township. According to James III, the Township gave him only a copy of the EPA Mini Pollution Report. Based on that report, he

[5] Navillus also purchased a third tax sale certificate.

wrote a letter to DEP, but received no response.[6] James III interpreted the Mini Pollution Report's concluding paragraph — "the site does not present an immediate threat to human health or the environment" — to mean that the Mercury at the site was no longer a problem.

Navillus foreclosed on the tax sale certificates. On June 11, 2001, a final tax foreclosure judgment was entered vesting title to the site in Navillus. Two months later, on August 12, 2002, Navillus conveyed title to plaintiff James Sullivan, Inc. for one dollar.

Plaintiffs DEP and the Administrator of the New Jersey Spill Compensation Fund commenced this action in August 2012, alleging causes of action under both the Spill Act, N.J.S.A. 58:10-23.11 to -23.24, and a theory of unjust enrichment.[7] Defendants answered, the parties took discovery, and plaintiffs moved for summary judgment. On May 16, 2014, the trial court issued an amended order and bench memorandum granting summary judgment to plaintiffs on all counts of the amended complaint.[8] The court found Navillus and Jim Sullivan, Inc. liable under the

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[6] The Sullivans retained a company to make an Open Public Records Act request of DEP, which the company did in October 2003. DEP responded by providing the EPA Mini Pollution Report but no other documents.

[7] Plaintiffs amended their complaint to allege a third cause of action against defendants Accutherm and Giuliano.

[8] The trial court amended the order to reflect the Sullivan family defendants had opposed the motion.

Spill Act and on plaintiffs' unjust enrichment theory. The trial court also determined that the Navillus general partners were personally liable for the judgment against the partnership, and pierced Jim Sullivan, Inc.'s corporate veil, thus determining that James Sullivan, Jr. was personally liable. The court entered judgment against the Sullivan defendants for $2,046,118.99.[9] This appeal followed.

II.

On appeal, the Sullivan defendants argue the trial court erred in granting summary judgment because there existed genuinely disputed issues of material fact concerning: whether the Sullivan defendants were "innocent purchasers" and therefore not liable under the Spill Act; the costs of remediation; and the Sullivan family members' personal liability. They also argue the trial court misapplied the doctrine of unjust enrichment.

When a party appeals from an order granting summary judgment, our review is de novo and we apply the same standard as the trial court under Rule 4:46-2. Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.

[9] The court also entered judgment against Accutherm and Giuliano for treble damages. As noted previously, those defendants did not appeal.

Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party demonstrated there were no genuine disputes as to material facts, and then we decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co. v. Hillside Bottling Co. Inc., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In doing so, we view the evidence "in the light most favorable to the non-moving party," Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), and review the legal conclusions of the trial court de novo, without any special deference. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The Spill Act imposes broad liability for cleanup costs:

> Except as provided in section 2 of P.L.2005, c.43 (C.58:10-23.11g12), any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of [N.J.S.A. 58:10-23.11f].
>
> [N.J.S.A. 58:10-23.11g(c)(1).]

Additionally,

> [A]ny person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the

> person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of [N.J.S.A. 58:10-23.11f].
>
> [N.J.S.A. 58:10-23.11g(c)(3).]

The statute includes exceptions to liability, one known as the "innocent purchaser" defense:

> A person, including an owner or operator of a major facility, who owns real property acquired on or after September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply, or if applicable, subparagraphs (a) through (e) apply:
>
> > (a) the person acquired the real property after the discharge of that hazardous substance at the real property;
> >
> > (b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except

> that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L.1976, c.141, or (iii) the person complies with the provisions of subparagraph (e) of paragraph (2) of this subsection;
>
> (c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;
>
> (d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (2), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property. For the purposes of this paragraph (2), all appropriate inquiry shall mean the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary, as defined in section 23 of P.L.1993, c.139 (C.58:10B-1), and performed in accordance with rules and regulations promulgated by the department defining these terms.

. . . .

[N.J.S.A. 58:10-23.11g(d)(2).]

The Sullivan defendants first argue that genuinely disputed issues of material fact existed as to whether Jim Sullivan, Inc. and Navillus were innocent purchasers. We disagree.

First, the Sullivan defendants do not dispute a discharge occurred. The corporation and the partnership had actual notice of the discharge. James Sullivan, III, a Navillus General Partner and an employee or shareholder of Jim Sullivan, Inc., obtained a copy of the EPA Mini Pollution Report. The report contained information concerning the discharge.

The report identified the site as one where scientific thermometers were manufactured and noted "500 to 1000" thermometers were found intact in the building, along with a vial of mercury. The report documented that "[p]reliminary soil sample analysis indicated positive responses for [two] samples[.]" Although the "responses" fell well below emergency removal guidelines for industrial and residential properties, two areas sampled inside the building were above the DEP proposed contaminant level. In a section entitled "Site Legal Status[,] Status of Site Cleanup[,]" the report's author noted: "None known to date." In another subsection entitled "Past/Present Enforcement[,]" the author noted the State had

issued "Directive 1995 – 04 served to Insurers 4/95 by [DEP] Responsible Party Cleanup Element[.]"

James Sullivan, III testified that when he read the Mini Pollution Report he concluded from its final three paragraphs that the contamination apparently had been taken care of. He pointed out that the report was done in 1995 "and nobody had ever done anything with the building and it sat vacant and just left to overgrow, so I put all those things together and with this saying no threat to human health or the environment, I figured that was it." Following the commencement of litigation, James III realized he had misinterpreted the report.

Regardless of James III's misinterpretation of the report, the report documented a "spill" within the meaning of the Spill Act. We reject the notion that an owner of contaminated property can avoid cleanup responsibility under the Spill Act based on a subjective misunderstanding of a report and the law.

Moreover, even if James III did not have actual notice, neither he, Jim Sullivan, Inc., nor Navillus established they "had no reason to know that any hazardous substance had been discharged[.]" N.J.S.A. 58:10-23.11g(d)(2)(d). The corporation and the partnership failed to present any evidence that they had undertaken "all appropriate inquiry into the previous ownership and uses of the property." Ibid. The statute provides that "all appropriate inquiry shall mean the performance of a

preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary[.]" Ibid.

"Preliminary assessment" is defined in N.J.S.A. 58:10-23.11b:

> "Preliminary assessment" means the first phase in the process of identifying areas of concern and determining whether contaminants are or were present at a site or have migrated or are migrating from a site, and shall include the initial search for and evaluation of, existing site specific operational and environmental information, both current and historic, to determine if further investigation concerning the documented, alleged, suspected or latent discharge of any contaminant is required. The evaluation of historic information shall be conducted from 1932 to the present, except that the department may require the search for and evaluation of additional information relating to ownership and use of the site prior to 1932 if such information is available through diligent inquiry of the public records[.]

Additionally, when Navillus purchased the property, and thereafter when Jim Sullivan, Inc. purchased the property from Navillus, the New Jersey Administrative Code, N.J.A.C. 7:26E-3.1(c) (1999), set forth a comprehensive list of items a preliminary assessment required. The list included historical information of the site history "from the time the site was naturally vegetated[,]" including "[a]ll raw materials, finished products, formulations and hazardous substances, hazardous

wastes, and pollutants which are or were present on this site, including intermediates and by-products[.]" N.J.A.C. 7:26E-3.1(c)(ii) and (iii) (1999). N.J.A.C. 7:26E-3.2 required preparation of a preliminary assessment report. The Sullivan defendants complied with none of the administrative code requirements.

The Sullivan defendants appear to argue that James III's inquiry of local officials and the DEP satisfied the "preliminary assessment" element of the innocent purchaser defense. That is simply not so. A preliminary assessment is defined in the Spill Act and in the administrative code. The Sullivan defendants failed to undertake a preliminary assessment. There is no disputed material fact about their non-compliance with the statutory and administrative code provisions. Consequently, the innocent purchaser defense is unavailable to them. We therefore affirm the judgment against Jim Sullivan, Inc. and Navillus for liability under the Spill Act.

The Sullivan defendants next contend "the trial court erred by imposing personal liability upon the individual Sullivan defendants." We agree that liability was properly imposed on the siblings as general partners of Navillus. The parties do not dispute the Sullivan siblings were general partners of Navillus. Nor do the parties dispute that, as a general

proposition, all partners are liable for a general partnership's obligations:

> Except as otherwise provided in subsections b. and c. of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.
>
> [N.J.S.A. 42:1A-18(a).]

The Sullivan defendants' sole argument against imposing liability on the general partners is that summary judgment "was premature in light of the many and manifest questions of fact regarding the Sullivan Defendants' status as innocent purchasers." We have resolved their assertion of the innocent purchaser defense against them. Accordingly, their argument fails.

We reach a different conclusion concerning the trial court's piercing of Jim Sullivan, Inc.'s corporate veil and consequent imposition of personal liability on James Sullivan, Jr. Our Supreme Court has recognized as a "fundamental proposition[] that a corporation is a separate entity from its shareholders, and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State, Dep't. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983) (internal citation omitted). "The purpose of the doctrine of piercing the corporate veil is to prevent an

independent corporation from being used to defeat the ends of justice to perpetrate fraud, to accomplish a crime, or otherwise to evade the law[.]" Ibid. (internal citations omitted).

The doctrine of piercing the corporate veil may also be applied when "[a]n individual . . . was using the corporation as his alter ego and abusing the corporate form in order to advance his personal interests." Sean Wood, L.L.C. v. Haggerty Group, Inc., 422 N.J. Super. 500, 517 (App. Div. 2011) (quoting Casini v. Graustein, 307 B.R. 800, (Bankr. D.N.J. 2004)).

Here, plaintiffs relied on these facts to support their attempt to pierce Jim Sullivan, Inc.'s corporate veil:

> The Sullivan Defendants disregarded corporate formalities and mingled assets by having Jim Sullivan, Inc. write the checks that purchased the tax certificates for Navillus. Navillus then transferred the [site] to Jim Sullivan, Inc. a year later for one dollar, at a time when both parties knew, or should have known, that the Property was contaminated. Jim Sullivan, Inc. later disbursed a number of other assets to the individual Sullivan Defendants." Plaintiffs assert that permitting James Sullivan, Jr., a principle of Jim Sullivan, Inc. to escape liability by hiding behind the corporate veil would result in an injustice to New Jersey's taxpayers.

First, James III's testimony – upon which plaintiffs based their assertion that Jim Sullivan, Inc. comingled assets by writing checks for the tax certificates Navillus purchased – is based on no more than an assumption. James III was asked, "and

you paid for it with a Jim Sullivan, Inc., check?" He replied: "I assume so." The questioner then continued: "Don't recall? Ok. So Jim Sullivan pays the money for this." Thus, the proposition that Jim Sullivan, Inc. comingled assets is based on James III's assumption, an assumption that the very attorney who elicited it interpreted as a lack of recollection. That is hardly a basis on which to base the piercing doctrine.

But even if James Sullivan, Inc. wrote the check, there appears to be no competent evidence explaining why that occurred, whether for a business purpose or some other reason. Writing a check for another entity on one occasion, during the more than twenty-year existence of Jim Sullivan, Inc., hardly demonstrates a pattern of comingling assets that might serve as a foundation for piercing a corporate veil.

Similarly, Jim Sullivan, Inc.'s purchase of the property for one dollar, and the corporation's later disbursement of assets to individual Sullivan defendants, without any evidence of the reason for the transfers or the circumstances under which they were made, are inadequate to grant summary judgment against individual defendants based on piercing a corporate veil.[10] This

[10] We also have difficulty discerning competent evidence that established James Sullivan, Jr.'s status as either an employee, shareholder, or officer of James Sullivan, Inc. at any relevant time. We assume there was no genuinely disputed material fact as to that issue.

is particularly so on a summary judgment motion when the parties opposing the motion are given the benefit of reasonable inferences.

When determining whether to pierce the veil of a single corporation and impose liability upon its shareholders, "[s]ome of the most common factors . . . are whether a corporation is inadequately capitalized, fails to observe corporate formalities, fails to issue stock, . . . fails to pay dividends[,] . . . operat[es] . . . without a profit[,] comingl[es] . . . corporate and personal assets, [has] nonfunctioning officers or directors, . . . and [has no] corporate records." William M. Fletcher, Fletcher Cyclopedia of Corporations, §41.30 (Rev. Ed. 2006). Analysis of these factors requires a fact-sensitive inquiry, an inquiry we fail to discern on the record before us. Accordingly, we reverse the judgment insofar as it implicates piercing Jim Sullivan, Inc.'s corporate veil and imposes individual liability on Jim Sullivan, Jr.[11]

In their final contention concerning liability, the Sullivan defendants argue the court erred in granting plaintiffs' unjust enrichment claim. We agree that the summary

[11] The trial court did not impose liability on the Sullivan siblings based on its decision to pierce Jim Sullivan, Inc.'s corporate veil.

judgment record was insufficiently developed to support that claim.

"To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). "The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Assocs. Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (App. Div. 1986) (quoting Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966). Here, the trial court did not distinguish between Jim Sullivan, Inc. and the individual Sullivan defendants in imposing liability on plaintiffs' unjust enrichment claim. Assuming the theory of unjust enrichment liability is applicable to a Spill Act case, we fail to discern how the individual Sullivan defendants, who never individually owned the site, were enriched by its clean-up. Moreover, neither the parties nor the trial court addressed how James Sullivan, Inc. was enriched. Plaintiffs presented no proofs that the clean-up made the property marketable or otherwise increased its value.

We conclude that the judgment on plaintiffs' unjust enrichment claim must be reversed. In so holding, we do not address the Sullivan defendants' argument that applying unjust

enrichment to a Spill Act case would negate a defense the Legislature has provided to innocent purchasers. That issue must abide a more fully developed record.

Lastly, the Sullivan defendants argue that the trial court granted plaintiffs' damage claim on incompetent evidence. Plaintiffs' proofs consisted of a four-paragraph certification signed by the Assistant Director of DEP's Publicly Funded Response Element, Site Remediation Program, a position he had held for twenty-four years. His certification's first paragraph contained the information about his titles and tenure. The second, third, and fourth paragraphs, and the language certifying them, state:

> 2. Since December 28, 1994, I have had overall responsibility for the Department's efforts to remediate mercury contamination on the former Accutherm site.
>
> 3. The Department has incurred expenses totaling $2,046,118.99 to clean up and remove mercury contamination at the former Accutherm site.
>
> 4. Attached as Exhibit A to this certification is a cost summary showing the Department's expenditures to date related to the remediation.
>
> I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.
> [(Emphasis added).]

The Sullivan defendants argue the certification did not conform with Rule 1:4-4(b). The Rule provides that in lieu of affidavits, "the affiant may submit the following certification which shall be dated and immediately precede the affiant's signature: 'I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.'" The Sullivan defendants assert the certification executed by plaintiffs' witness also violated Rule 1:6-6 requiring affidavits be based on personal knowledge.

The Sullivan defendants also contend the "cost summary" was inadequate to establish that the damages were compensable under the Spill Act, and that plaintiffs also failed to prove there was a nexus between "the hazard and the remediation costs."

Plaintiffs respond that defendant did not raise their rule-violation arguments before the trial court; rather, they merely denied both "that [the] certification contains proof of payment toward the balance of $2,046.118.99 and that 'the . . . certification contains proof of [the] payments' claimed by DEP." For those reasons, plaintiffs submit that we should decline to address the arguments.

Plaintiffs also contend the certification substantially satisfies the requirement that affidavits be based on personal knowledge and contain language to that affect. They submit a

certification to the best of the Assistant Director's knowledge substantially satisfies the requirements of Rule 1:4-4(b). They argue in conclusory fashion that the certification "indicates that he possesses personal knowledge of the facts to which he certified," and that the attached cost summary "corroborated [his] factual assertions." They reiterate that the Sullivan defendants did not object to the cost summary in opposing plaintiffs' summary judgment motion.

The certification submitted by plaintiffs was incompetent. If the facts upon which a motion is based do not appear of record and are not judicially noticeable, "the court may hear [the motion] on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein." R. 1:6-6. Further, "[t]he court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions." Ibid.

Here, by modifying the certification language as set forth in Rule 1:4-4(b), the person signing the certification effectively removed the requirement that it be based on first-hand knowledge. Nor did the certification authenticate the attached "cost summary" as a business record.

Nonetheless, the Sullivan defendants do not dispute plaintiffs' assertion that defendants did not raise this issue before the trial court.

> It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."
>
> [Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied 31 N.J. 554 (1960)).]

The Sullivan defendants have not established either that their challenge to the damages calls into question the jurisdiction of the trial court or concerns a matter of great public interest. Accordingly, we decline to consider the issue.

Moreover, had the Sullivan defendants raised the competency of the certification before the trial court, the court could have required the certification's author to submit to cross-examination to determine whether the certification was based on first-hand knowledge or an admissible business record. The failure to raise the issue deprived the court of the opportunity to resolve the very challenge defendants now raise.

More importantly, however, the Sullivan defendants did not demonstrate the existence of a genuinely disputed material fact

concerning damages. Rather, they merely denied plaintiffs' statement of material facts concerning damages. Mere denials are inadequate. A party opposing a summary judgment motion "may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial." R. 4:46-5(a).

The Sullivan defendants did not contend they had an inadequate opportunity to discover plaintiffs' damages claim, and they did not submit affidavits or certifications establishing they were "unable to present by affidavit facts essential to justify opposition[.]" Ibid. Had they done so, the court had the discretion to "order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or . . . make such other order as may be appropriate." Ibid. Accordingly, we affirm the judgment as to the quantum of damages because we cannot find that defendants have substantively contested the amount of the damages and they failed to raise the procedural arguments they make here to the trial court.

For the foregoing reasons, we affirm the summary judgment under the Spill Act as to Jim Sullivan, Inc., Navillus, and the four siblings as Navillus general partners. We reverse the

summary judgment as to Jim Sullivan based upon piercing Jim Sullivan, Inc.'s corporate veil. We also reverse the order granting summary judgment insofar as it is based on the doctrine of unjust enrichment.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.