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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2805-14T2

POLIFLY GAS, INC.,
GURINDER SINGH[1] and
RUPINDER SINGH,

Plaintiffs-Appellants,

v.

HAROLD G. SCHRADER, JR.
and RHEA SCHRADER,

Defendants-Respondents.

Argued on October 13, 2016 – Decided June 14, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5472-13.

Paul S. Doherty, III, argued the cause for appellants (Hartmann Doherty Rosa Berman & Bulbulia, LLC, attorneys; Mr. Doherty and Robin D. Fineman, on the briefs).

Jeffrey C. Mason argued the cause for respondents.

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[1] Gurinder Singh alternately appears as Gurinderjit Singh in the record.

PER CURIAM

Polifly Gas, Inc., Gurinder Singh and Rupinder Singh (collectively, plaintiffs) appeal from the January 9 and June 3, 2015 Law Division orders dismissing their complaint with prejudice pursuant to Rule 4:6-2(e) and denying their motion for leave to amend the complaint. Plaintiffs argue that "the trial court failed to follow the standard of review on a motion to dismiss and instead looked beyond the face of the [c]omplaint to consider questions of fact that were not properly before the court." Plaintiffs assert that in so doing, the court "improperly resolved multiple issues of fact before any discovery had been completed." We agree and reverse.

I.

The dispute stems from the sale of a Hackensack gas station located at 150 Polifly Road (hereinafter, the property). The owners of the gas station, defendants Harold and Rhea Schrader, entered into an agreement on October 25, 2011, to sell the property to plaintiffs for $1.5 million. Defendants agreed to finance $1.1 million of the purchase price. When the contract was signed, there were four underground storage tanks (USTs) on the property that played a prominent role in the operation of the gas station. The closing took place on January 18, 2012.

Shortly after the closing, plaintiffs discovered that a number of the USTs had an interstitial breach of their outer hulls. The tanks are designed with two containers, an inner steel drum and an outer fiberglass drum to prevent petroleum from seeping into the surrounding soil and groundwater. An interstitial breach occurs when a crack or hole forms in the outer container, leading to water accumulating in the interstitial region. As a result of the breach, the station was closed in order to replace the damaged tanks, causing plaintiffs to lose business and incur other expenses.

On July 15, 2013, plaintiffs filed a three-count complaint against defendants alleging fraud, equitable fraud, and negligence, respectively, and seeking compensatory and punitive damages or reformation of the contract of sale. In count one, plaintiffs alleged that defendants were aware of the interstitial breaches and the tank monitoring system records confirming the breaches; defendants knowingly concealed the information from plaintiffs in the negotiation, agreement and sale of the property; plaintiffs relied on defendants' false representations of the condition of the USTs; and plaintiffs suffered damages as a result. In count two, plaintiffs alleged that, in the event defendants were unaware of the interstitial breaches, then defendants were

liable to plaintiffs for equitable fraud for the damages plaintiffs suffered.

In count three, plaintiffs alleged that, by statute and operation of law, defendants "were under a duty to use reasonable care in the inspection, maintenance and monitoring of the UST systems[.]" However, defendants "negligently, carelessly and recklessly failed and neglected to adopt proper monitoring of the USTs in question, failed to have proper maintenance and monitoring via cathodic device and otherwise, and failed in general to ascertain the breaches" of the outer hulls. According to plaintiffs, "[a]s a direct and proximate result" of defendants' "negligence, carelessness and recklessness[,]" plaintiffs suffered damages.

In response to plaintiffs' complaint, on October 9, 2014, defendants filed a motion to dismiss pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief may be granted. To support the motion, defendants submitted the certification of defendant Rhea Schrader (Ms. Schrader) and appended a copy of the contract of sale. Ms. Schrader certified that during the negotiations, plaintiffs "were made aware that the property was the subject of an [ongoing] environmental remediation and monitoring (clean-up), with the New Jersey Department of Environmental Protection (NJDEP) under case no. 08-10-13-1651-

15[.]" Ms. Schrader averred that plaintiffs were also made aware that, if the business was not sold, defendants were "planning to install new [USTs] at the station to replace and upgrade the existing USTs, within the upcoming months." Further, Ms. Schrader certified that plaintiffs proceeded with the purchase aware of "the clean-up and the required installation of new USTs[,]" both of which were expressly provided for in the terms of the contract, whereby plaintiffs agreed to assume and undertake responsibility for both at their cost and expense.

According to Ms. Schrader, Section 8 of the contract, entitled "Purchaser's Covenants[,]" provided in pertinent part that:

> Purchasers have secured the services of a licensed environmental consultant to prepare and execute a plan to remediate soil and groundwater contamination under NJDEP case number 08-10-13-1651-15, and Purchasers will submit a remediation certification with the NJDEP, for remediation and will diligently pursue and obtain a No Further Action letter (NFA) or its equivalent as to soils and groundwater from the NJDEP for the subject case and will endeavor to perform all required work to deliver same to Sellers within five years, post-closing.

Section 24 of the contract, entitled "Purchasers' Representations[,]" provided in pertinent part that:

> C. The purchasers shall buy and install [two] new USTs at the premises, at purchasers' cost, within five (5) years of closing.

> D. The purchasers are experienced in the gasoline service station business and have the expertise and sufficient capital to competently operate the business assets that are the subject of this sale.

Ms. Schrader averred further that the contract provided plaintiffs with a due diligence period until October 14, 2011, "to investigate the property, the NJDEP case history . . . and all aspects of the business and its equipment and operation, including the USTs," in order to decide whether to go forward with the purchase. Ms. Schrader certified that in conjunction with affording plaintiffs the "unfettered right to cancel the agreement under the due diligence provision," section 16 of the contract, entitled "'As Is' Sale; Risk of Loss; Condition of Subject Premises[,]" provided that:

> Purchasers acknowledge that [p]urchasers have fully and thoroughly inspected and examined the [s]ubject [p]remises, the fixtures appurtenant to same and that [p]urchasers shall accept same in "[a]s [i]s" condition and "[w]ith [a]ll [f]aults" as of the date hereof and the [c]losing. Sellers disclaim all warranties, express or implied, as to any defects, patent or latent.
>
> A. Sellers make[] no representations as to the (i) structural condition of the roofs, floors, walls or any other part of the [s]ubject [p]remises, (ii) the systems in or affecting the [s]ubject [p]remises[,] (iii) the environmental condition of the [s]ubject [p]remises, except that sellers have delivered all environmental reports in their possession to purchasers, (iv) any other matter relating

> to or affecting the structural or non-structural condition of the [s]ubject [p]remises and the fixtures appurtenant to same. Purchasers hereby unconditionally and irrevocably waive and release any and all actual and potential rights [p]urchasers may have regarding any warranty, express or implied, of any type or kind, relating to the property, such waiver and release being absolute, unconditional, irrevocable, complete, total and unlimited in any way. This waiver and release includes but is not limited to a waiver and release of express warranties, implied warranties, warranties for a particular use, warranties of merchantability, warranties of habitability, strict liability rights and claims of every kind and type including but not limited to product liability type claims and all rights and claims relating to or attributable to environmental conditions on or emanating from the property. This provision shall survive the closing of title.
>
> B. This [a]greement is entered into with [p]urchasers' full knowledge as to the value of the [s]ubject [p]remises and not upon any representations as to the value, character, quality or condition thereof, their fitness for any particular use, the collectability of rents, issues and profits thereof and except as otherwise explicitly stated herein, [s]ellers make[] no representations with respect thereto and assumes no responsibility or liability with respect to or account of any condition which may exist.

In addition, according to Ms. Schrader, section 23 of the contract, entitled "Sellers' Representation[,]" specified defendants' representations relating to the environmental condition of the property and the USTs as follows:

> C. UST Project: Sellers shall supply [two] MPDs and computer system to purchasers at no additional cost. (Purchasers to buy and install [two] new UST's and install the MPDs at purchasers' cost).
>
> D. Environmental Reports. Sellers make no representations with respect to the environmental condition of the [s]ubject [p]remises except as contained in any environmental reports of sellers' environmental consultants supplied to purchasers. Sellers shall have no liability to [p]urchasers for any claims by the [p]urchasers or third parties based on the presence of [h]azardous [s]ubstances, at, under or on the [s]ubject premises.

Ms. Schrader certified that plaintiffs "investigated the property and the business with the assistance of legal counsel and their environmental consultant" and "did not exercise their right to cancel the [c]ontract under the due diligence clause" but instead "went forward with the purchase" and "agreed to an unconditional and irrevocable waiver and release of claims 'of every kind and type[.]'"

In opposing defendants' motion to dismiss, plaintiffs submitted a certification in which plaintiff Gurinderjit Singh (Mr. Singh) averred that plaintiffs purchased the property relying on "the accuracy of the information" contained in "various environmental reports and system print outs" provided by defendants as well as defendants' oral representations that "the only remediation remaining was to the [groundwater]." However,

Mr. Singh certified that he "discovered after the purchase that of the four (4) USTs on the site at the time of purchase, three (3) had breaches in their outer hull, otherwise called interstitial breaches" which rendered "the tanks unusable in the eyes of the New Jersey DEP." Mr. Singh asserted that although he "had agreed to replace the USTs over a five (5) year period from the date of closing[,]" since the interstitial breach prevented the tanks from being utilized, the DEP "shut down the station completely for over four months[,]" and the remediation became "greater than that which was represented to [plaintiffs] at the time of the negotiation of the contract."

According to Mr. Singh, although "all of the USTs were monitored by a Veeder Root tank monitoring system which immediately sounds an alarm when [an] interstitial breach occurs" and generates "a written printout of the breach[,]" he "was advised after the closing by the DEP that the underground probe that detects outer hull breaches had been removed from the Veeder Root system" and the system was "tampered with" to "indicate that all systems were operating normally." Mr. Singh certified that although the breach existed prior to the sale and "the alarm from the Veeder Root system should have sounded," defendants concealed the breach by removing the alarm monitor "from the USTs, to prevent the Veeder Root system from sounding an alarm" during his examination of the

tanks. Further, Mr. Singh averred that defendants provided documents to his environmental reviewer "which contained no Veeder Root alarms or printouts indicating an interstitial breach."

In a reply certification, Ms. Schrader disputed plaintiffs' claims. Ms. Schrader averred that the "UST reports supplied to plaintiffs in September 2011 included UST tank testing results performed by ATS Environmental Services" (ATS), disclosing water in the interstitial cavity of all the gasoline tanks, as well as the July 27, 2011 summary report performed by T. Slack Environmental Services (TSES), the company hired by defendants to assist them with DEP compliance, recommending against invasive remediation until "the final disposition of the existing tanks." Ms. Schrader also denied any alteration to the tank monitoring system and certified that the property "had the Incon UST monitoring system and not the Veeder Root system."

According to Ms. Schrader, the Incon system provides "data about the operation of the USTs through the generation of Automatic Tank Gauge [ATG] [r]eports" which "relate to the integrity of the tank walls and the intrusion of water into the tank." Ms. Schrader certified that the ATG weekly reports, which are maintained on the premises "at all times" for DEP inspections and are "required to maintain UST insurance[,]" were provided to plaintiffs in order to obtain new UST insurance. In addition, Ms. Schrader asserted

that the necessity for UST upgrades was specifically contemplated in the negotiation of the contract, and the scope and cost of the project were disclosed to plaintiffs by their own environmental consultant, SSS Construction Company, whose proposal totaled approximately $246,300, as well as defendants' consultant, T. Slack Environmental Services, whose proposal totaled approximately $337,002. Both proposals included the installation of the Veeder Root system and reserved additional costs for excavation, soil disposal and removal of contaminated soil.

On December 5, 2014, following oral argument, the court ruled as follows:

> It's obvious to this [c]ourt from the exhibits that are provided . . . that there was disclosure to [plaintiffs] that there were problems here and things had to be done.
>
> And they had full access to the NJ DEP files and they hired their own individuals to review the situation. The . . . allegation that somehow there was a fraud and just to say there's a fraud, I mean, at this point there should be something that you have to show that there was a fraud perpetrated on your client by . . . something.
>
> I mean, I can't remember seeing something with such full disclosure at a time of a closing having to do with an environmental matter as this, having to do with the sale of the property. I'm going to be granting the application.

In response to plaintiffs' attorney's inquiry whether the motion was "being granted as a summary judgment . . . as opposed to a dismissal under Rule 4:6-2[,]" the court replied:

> I am granting the application to dismiss this complaint for all of the reasons set forth on the record, not on the basis of summary judgment, because summary judgment would require a different analysis but based upon everything before this [c]ourt, and you certainly could have given other documents to this [c]ourt.

The following colloquy then ensued:

> [PLAINTIFFS' ATTORNEY]: I'm not allowed to respond.
>
> THE COURT: Okay. I'm not going to have any further oral argument today. I'm going to give you two weeks to give me a surreply to the reply and then I'll determine whether or not we're going to have further oral argument.
>
> . . . .
>
> [DEFENDANTS' ATTORNEY]: [W]ith respect to the materials that were supplied in the certification of Ms. Schrader relating to matters outside of the complaint and the pleading, I believe under any analysis that includes Rule 4:6-2 motion to dismiss and Rule 4:46 motion for summary judgment when matters outside of the pleading are presented, and it's my apology for not clearly briefing this issue, the matter becomes a motion for summary judgment and must be analyzed on that basis.
>
> Because this certification was submitted, I would submit to the [c]ourt that we would . . . like an opportunity to more thoroughly brief that for the [c]ourt's benefit.

THE COURT: Okay.

Thereafter, in a certification submitted to the court in opposition to the motion, Mr. Singh certified that the documents provided by defendants did not constitute proof of an outer hull breach because such a breach would have required defendants to promptly cease operations and notify DEP, neither of which occurred. According to Mr. Singh, had he been advised of an outer hull breach that required immediate removal and replacement of the USTs, rather than the five years specified in the contract, he "would never have proceeded with the closing." In support, plaintiffs submitted the certification of a purported expert, Peter A. Ianzano, Jr., who opined that water accumulating "in the interstitial zone between the inner and outer hulls of a UST is not proof of an outer hull breach" and can be rectified without replacing the UST.

On January 9, 2015, following additional oral argument that did not address the applicable standard, the court again ruled for defendants and entered an order dismissing the complaint. The court viewed the sophistication of the parties and the manner in which the negotiations progressed as important factors in evaluating the motion. The court explained:

> [Plaintiffs] are very sophisticated purchasers in the field of gas stations. This

is their family business. This is their business. The negotiated sale price was 1.5 million. [Plaintiffs] requested that the defendants . . . provide financing of 1.1 million to complete the purchase . . . .

This is an important factor for the [c]ourt because clearly the sellers of the property had an interest in the business being successful going forward.

Now [plaintiffs] were unequivocally made aware that the property was subject of an ongoing environmental remediation and monitoring cleanup with the New Jersey DEP . . . and that H&R, Inc. was planning to install new underground storage tanks at the station to replace and upgrade the existing USTs within upcoming months if the defendants did not sell the business.

[Plaintiffs] nonetheless were very interested in going forward with the purchase and the facts of the cleanup and the required installation of the new USTs were expressly provided for in the terms of the contract, whereby [plaintiffs] agreed to assume and undertake responsibility for the cleanup and to install new USTs, all at [plaintiffs]' cost and expense.

. . . .

The contract provided [plaintiffs] with a due diligence to investigate the property, the New Jersey DEP case history, and all aspects of the business and its equipment and operation, including the USTs, and to decide whether or not to go forward with the purchase or cancel the contract for any reason, in their complete discretion.

The contract includes representations that [plaintiffs] would undertake the cleanup and install the new USTs and that they had the

> experience and expertise to operate the gas station business.

In rendering its decision, the court relied on the express terms of the contract, particularly the provision "that the sale is, 'as is, with all faults, and that the sellers disclaim all warranties, expressed or implied, as to any defects patent or latent and make no representation regarding the condition of the business or the property.'" Further, the court underscored the provision specifying "an unconditional and irrevocable waiver and release of sellers from any future claim alleging defects in the property or business property being sold." The court noted that plaintiffs "investigated the property and the business with assistance of legal counsel and their environmental consultant" and "were satisfied with the business and property and did not exercise their right to cancel the contract under the due diligence clause" but instead "continued with the purchase, and proceeded to schedule a closing."

Regarding the seller's representations relating to the UST project and the environmental condition of the property, the court noted:

> Now the UST report supplied to [plaintiffs] in due diligence actually disclosed water in the interstitial cavity of all gasoline tanks. The September, 2011 due diligence package . . . supplied to [plaintiffs] included the UST tank testing

> results performed by ATS Environmental Services and this [c]ourt has reviewed the report, it was attached . . . to Ms. Schrader's reply certification, and it states specifically there is a 33-inch water in all gasoline tank interstitial with sensors pulled up.
>
> Therefore, Mr. Singh knew about the condition of the USTs in the course of due diligence . . . well in advance of closing. It is respectfully submitted . . . that no one with his background and experience in the operation of gas stations and in this industry would buy a gas station without first examining the UST reports required under state regulations.
>
> The September, 2011 due diligence package . . . supplied to the purchaser included the summary report of groundwater investigation requirements . . . performed by T. Slack Environmental Services dated July 27, 2011.
>
> The TSES summary report concludes any further remediation plans will depend upon the final disposition of the existing tanks. Until this is determined, TSES does not recommend any invasive remediation.
>
> He understood the significance of the ATS tank testing report and the TSES summary report supplied to him in the course of due diligence. What was clear is the UST project was necessary and the final cost of remediation was unknown.

Regarding plaintiffs' allegations that the Veeder Root monitoring system was tampered with, the court found:

> Now the station had the icon TS-1000 UST monitoring system, not the [Veeder Root] monitoring system, as is suggested by all of the papers submitted by the plaintiff.

> Mr. Singh was not misled by any fraudulent altering of the [Veeder Root] tank monitoring system and had all of the documentation that has been provided to the [c]ourt and nonetheless he still chose to go forward with this purchase under the conditions clearly set forth in the contract.

The court also determined that

> [T]he scope and cost of the UST upgrade was disclosed to Mr. Singh in the course of due diligence by Singh's own environmental consultant, who proposed an installation of the [Veeder Root] system.
>
> He was unequivocally aware the entire UST project involved removal of soils from the property, the final volume of which could not be determined, and Mr. Singh elected to purchase.

The court concluded:

> Accordingly, there is no basis for plaintiff's complaint. There is no contractual fraud. There is no equitable fraud. And no further discovery will change the facts of what he clearly knew, what he was allowed to investigate, what his own attorney, what his own consultants advised him, what he himself knew as being a professional in the industry, and all of the disclosures the [c]ourt has been able to review and that Mr. Singh and his professionals had in their possession.

Plaintiffs then moved for clarification on whether or not the dismissal was with prejudice or without, and to amend their complaint to include breach of contract and breach of implied duty of good faith counts. Those counts alleged that the environmental

reports provided by defendants, including the April 27, 2011 ATS Report, falsely represented the condition of the USTs. It was alleged that those false representations breached the provision of the contract in which defendants represented that the information contained in the environmental reports were true and accurate and breached the implied covenant of good faith and fair dealing inherent in the contract. On June 3, 2015, the court clarified that the complaint was dismissed with prejudice and denied plaintiffs' motion to amend the complaint. This appeal followed.

II.

We review a decision to dismiss a complaint as a matter of law under Rule 4:6-2(e) de novo, using the same standards relied on by the motion judge. Assuming arguendo that the facts stated within the four corners of the complaint are true, and granting plaintiff the benefit of all rational inferences that can be drawn from such facts, we must determine:

> whether a cause of action is "suggested" by the facts. In reviewing a complaint dismissed under Rule 4:6-2(e) our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. However, a reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." At this preliminary

> stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.
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> [Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citations omitted).]

Thus, a motion to dismiss under Rule 4:6-2(e) "must be based on the pleadings themselves." Roa v. Roa, 200 N.J. 555, 562 (2010). For purposes of such a motion, the "complaint" includes the "'exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir.), cert. denied, 543 U.S. 918, 125 S. Ct. 271, 160 L. Ed. 2d 203 (2004)). However,

> If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.
>
> [R. 4:6-2].

Here, the court clearly looked outside the pleadings and went far beyond the four corners of the complaint when it considered

the factual and procedural history of the dispute between the parties. In fact, the court afforded the parties the opportunity to present additional materials pertinent to the motion. In so doing, the court converted the Rule 4:6-2(e) motion into a Rule 4:46 summary judgment motion. Pressler, Current N.J. Court Rules, comment 4.1.2. on R. 4:6-2 (2017); see also Roa, supra, 200 N.J. at 562. However, the court expressly found "no basis for plaintiff's complaint" and dismissed the complaint for failure to state a claim upon which relief can be granted and "not on the basis of summary judgment, because summary judgment would require a different analysis[,]" one in which the court did not engage.

That said, because the court purportedly dismissed plaintiffs' complaint pursuant to Rule 4:6-2(e), we consider whether the complaint is capable of withstanding dismissal pursuant to a proper application of that rule. In dismissing the complaint, the court rejected plaintiffs' claims based on its evaluation of conflicting certifications and its determination that plaintiffs were unable to prove their allegations. However, at this stage in the proceeding, in determining whether dismissal under Rule 4:6-2(e) was warranted, the court should not concern itself with plaintiffs' ability to prove their allegations. Printing Mart-Morristown, supra, 116 N.J. at 746.

Rather, the court's focus should have been whether plaintiffs alleged sufficient facts that, if proven, would establish fraud, the elements of which are: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997) (citing Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624-25 (1981)). Moreover, in order to prove equitable fraud, "[t]he elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom . . . are not essential[.]" Jewish Ctr. of Sussex Cnty., supra, 86 N.J. at 625 (citation omitted).

To sue for negligence, a plaintiff need only allege facts to show that "a defendant owed a duty of care, the defendant breached that duty, and injury was proximately caused by the breach." Siddons v. Cook, 382 N.J. Super. 1, 13 (App. Div. 2005). Foreseeability of the risk of harm is the foundational "fact-specific" element in the determination of whether a duty exists. Williamson v. Waldman, 150 N.J. 232, 239 (1997); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993). As such, defendants are considered to have a duty if in a position to discover the risk,

or would have reason to know that plaintiffs would suffer a particular injury. J.S. v. R.T.H., 155 N.J. 330, 337-38 (1998).

To further compound the error, although "dismissals pursuant to Rule 4:6-2(e) should ordinarily be without prejudice and . . . plaintiffs generally should be permitted to file an amended complaint[,]" Nostrame v. Santiago, 213 N.J. 109, 128 (2013), the court dismissed the complaint with prejudice without giving plaintiffs an opportunity to amend. From our review, we are satisfied that the court considered documents well beyond the four corners of plaintiffs' complaint in deciding the motion. Because the court did not convert the motion into a Rule 4:46 motion for summary judgment or apply the appropriate standard for a Rule 4:6-2(e) motion, we are constrained to reverse and remand. We do not offer any opinion on the merits of any of plaintiffs' claims and, on remand, defendants may assert any and all defenses and may file the appropriate application anew.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION