SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5144-14T2

DAVANNE REALTY COMPANY,

Plaintiff-Appellant,

v.

THE DIAL CORPORATION,

Defendant-Respondent.

Argued January 10, 2017 – Decided June 23, 2017

Before Judges Rothstadt and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3517-14.

Craig S. Provorny argued the cause for appellant (Herold Law, P.A., attorneys; Mr. Provorny, on the briefs).

Camille V. Otero argued the cause for respondent (Gibbons P.C., attorneys; Ms. Otero, of counsel; Paul M. Hauge, on the brief).

PER CURIAM

Plaintiff Davanne Realty Company owns land in Clifton that is occupied by defendant The Dial Corporation pursuant to a long-

term lease. Prior to this action, both parties had been named as third-party defendants in a lawsuit relating to the environmental contamination of the Passaic River and Newark Bay. The parties settled that litigation and plaintiff filed suit seeking indemnification and contribution from defendant. The Law Division dismissed the complaint with prejudice for failure to state a claim upon which relief can be granted, R. 4:6-2(e). The motion judge relied upon language in the indemnification clause of the parties' lease that he determined restricted defendant's liability for contamination from its operations to an area "in or about the property" that did not include the area that was the subject of the prior lawsuit, which the judge found was "over twenty miles away." The judge further determined that the lease did not contemplate "environmental or related damages."

On appeal, plaintiff argues that in dismissing its complaint, the motion judge failed to recognize the parties' intent that plaintiff "be relieved of any and all liability caused by [defendant]'s acts" as demonstrated in their lease. It also contends that the lease "unequivocally required [defendant] to defend and indemnify [plaintiff] for [plaintiff]'s liabilities arising from [defendant]'s acts." We agree and reverse.

In reviewing the disposition of a motion to dismiss for failure to state a claim, we employ the same standard applied by

the motion court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005). "In a Rule 4:6-2(e) motion, the court reviews the complaint to determine whether the allegations suggest a cause of action[.]" In re Reglan Litig., 226 N.J. 315, 324 n.5 (2016) (citing Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)), cert. denied, PLIVA, Inc., v. Kohles, ___ U.S. ___, 137 S. Ct. 1434, 197 L. Ed. 2d 648 (2017). "At this preliminary stage of the litigation [we are] not concerned with the ability of plaintiff to prove the allegation contained in the complaint." Printing Mart-Morristown, supra, 116 N.J. at 746. Rather, the court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint" to determine "whether a cause of action is 'suggested' by the facts." Ibid. (first citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987); then quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Dismissal is appropriate only if, after proper consideration of the complaint and referenced documents, there remains "no basis for relief and discovery would not provide one[.]" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005); see also N.J. Citizen Action, Inc. v. Cty. of Bergen, 391 N.J. Super. 596, 605-06 (App. Div.), certif. denied, 192 N.J. 597 (2007).

Applying this standard, we turn to plaintiff's complaint and its allegations about the parties' lease and the underlying lawsuit that they settled. The parties' predecessors in interest entered into the lease in 1958. The lease required the landlord to construct a building on the premises for the tenant's sole use and occupation. After construction of the premises, defendant or its predecessors were in sole possession of the property and were the only entities that conducted operations from the demised premises.

The lease imposed upon the tenant all obligations associated with the property. For example, at the outset, the lease stated the parties intended that, except for the landlord's mortgage obligation, the tenant was responsible for "all costs, charges, expenses and damages that . . . could have been chargeable during the said term, against the said leased premises and/or payable by the Lessor[.]" Similarly, paragraph 4(a) of the lease imposed upon the tenant all payments required "by virtue of any present, or future, law, order, or ordinance of the United States of America, or of the City of Clifton, County of Passaic, or State of New Jersey, or of any department, officer, or bureau thereof." (emphasis added). Paragraph 7(b) imposed on the tenant the obligation to comply with all laws, present or future, associated with the use of the premises. It specifically required the tenant to be liable for "all costs, expenses, claims, fines, penalties

and damages that may, in any manner, arise out of, or be impose[d] because of, the failure of the Lessee to comply with this covenant." Paragraph 10 of the lease required the tenant to obtain and maintain liability insurance "for the benefit of" the landlord, "protecting the Lessor against any and all liability occasioned by accident, or disaster[.]"

The indemnification clause was set forth in paragraph 13 of the lease. It stated:

> That the Lessee shall indemnify and save harmless the said Lessor from and against any and all claims, suits, actions, damages and/or causes of action arising, during the term of this lease, for any personal injury, loss of life and/or damage to property sustained in, or about, the demised premises, or the buildings and improvements thereon, or the appurtenances thereto, or upon the adjacent sidewalks, or streets, and from and against all costs, counsel fees, expenses and liabilities incurred in and about any such claim, the investigation thereof, or the defense of any action, or proceeding, brought thereon, and from and against any orders, judgments and/or decrees, which may be entered therein.

The litigation in which the parties were named as third-party defendants arose from an action originally commenced by the New Jersey Department of Environmental Protection in 2005. Two of the named defendants in that action joined plaintiff and defendant pursuant to the Spill Compensation and Control Act (Spill Act),

N.J.S.A. 58:10-23.11 to -23.24.[1] The third-party complaint alleged that during the period plaintiff or its predecessor owned the subject property, defendant or its predecessors discharged hazardous materials on the property, and that the discharged hazardous materials migrated into the Passaic River/Newark Bay Complex. It also alleged defendant's predecessor periodically spilled highly concentrated detergents, which washed from the property into the storm sewer and into the Passaic River.

Four years later, the parties settled the litigation by plaintiff and defendant each agreeing to pay $195,000 to the third-party plaintiffs. The terms of the settlement were incorporated into a consent judgement that also provided that the parties reserved their right to assert claims against any entity for contribution and cost recovery, including claims for contribution for "[d]ischarges of hazardous substances at or from" third-party defendants' property sites.

Plaintiff paid its share of the Passaic River/Newark Bay settlement amount and later filed this action seeking contribution and indemnification from defendant. The complaint alleged plaintiff was entitled to "contractual indemnification," "Spill Act contribution," and "statutory contribution" pursuant to the

[1] The parties here were among approximately three hundred third-party defendants named in the underlying action.

Joint Tortfeasor Act, N.J.S.A. 2A:53A-1 to -48. Defendant filed its motion to dismiss in lieu of an answer to the complaint and the motion judge entered an order on June 30, 2015 dismissing the complaint.

Against this background, we conclude that plaintiff sufficiently pleaded claims upon which relief could be granted if the allegations are proven. We believe the motion judge read the parties' lease too narrowly and failed to consider the lease as a whole when he granted defendant's motion.

"[T]he polestar of construction of a contract is to discover the intention of the parties." Jacobs v. Great Pac. Century Corp., 104 N.J. 580, 582 (1986) (quoting Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)). "Courts enforce contracts 'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014) (quoting Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001)); see also Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). "[T]o discover the intention of parties to a contract [a court should consider] the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation

placed on the disputed provision by the parties' conduct.'" VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 548 (1994) (quoting Jacobs, supra, 104 N.J. at 582); see also Washington Constr. Co., Inc. v. Spinella, 8 N.J. 212, 217 (1951) ("[a] contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions" (citation omitted)).

Reading the parties lease as a whole, we conclude that its indemnification clause encompassed plaintiff's claim for relief as stated in its complaint. First, the lease called for the construction of a building that was to be used by the tenant exclusively. Second, the lease was a "triple net lease," "in which a commercial tenant was to be responsible for 'maintaining the premises and for paying all utilities, taxes and other charges associated with the property.'" Geringer v. Hartz Mountain Dev. Corp., 388 N.J. Super. 392, 400 n.2 (App. Div. 2006) (quoting N.J. Indus. Props. v. Y.C. & V.L., Inc., 100 N.J. 432, 434 (1985)), certif. denied, 190 N.J. 254 (2007). Third, the lease expressly stated that it was the parties' intention that the tenant would pay any damages chargeable against the landlord. Fourth, the lease required the tenant be solely responsible for compliance with any future laws and for violations thereof as well as for any claims arising from its operations. Here, plaintiff's complaint

stated that the alleged contamination that gave rise to the third-party complaint filed against the parties pursuant to the Spill Act — a law that did not exist until many years after the lease was executed - was solely the result of defendant's or its predecessor's operations.

Finally, the indemnification clause also expressed an intention that the tenant would be obligated to hold the landlord harmless from any claims for "damages and/or causes of action arising, . . . for . . . damage to property sustained in, or about, the demised premises . . . ." and "from and against all . . . liabilities incurred in and about any such claim . . . ." Contrary to the motion judge's reading of that language, we conclude that it did not impose any distance limitation on damages sustained by other property owners arising from contamination caused by defendant's operations. When the lease is read in its entirety, it demonstrates an intent to hold plaintiff harmless for all such liabilities arising from defendant's use and does not contain ambiguous provisions that require interpretation.[2] See Hardy ex

[2] The motion judge initially found the words "in or about" in the indemnification clause to be "unambiguous." Yet, the judge "interpreted" those three words without "read[ing] the document as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009).

rel. Dowdell, supra, 198 N.J. at 103; Washington Constr. Co., Inc., supra, 8 N.J. at 217.

Of course, the allegations of the complaint are subject to the proofs developed through discovery and, if necessary, trial. At this stage, however, it was an error to dismiss the complaint.

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