SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1161-15T2

BRIAN RODGERS,

Plaintiff-Appellant,

v.

FARER FERSKO, PA, RICHARD J. ERICSSON, DAVID B. FARER, and JACK FERSKO,

Defendants/Third-Party Plaintiffs,

v.

RAYMOND RODGERS,

Third-Party Defendant,

and

PARKER-HANNIFIN CORPORATION,

Third-Party Defendant/Respondent.

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Argued March 21, 2017 – Decided April 23, 2018

Before Judges Leone and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6970-12.

Jason S. Haller argued the cause for appellant (Kozyra & Hartz, LLC, attorneys; Jason S. Haller, of counsel and on the briefs).

Nicole R. Moshang argued the cause for respondent (Manko, Gold, Katcher & Fox, LLP, attorneys; Nicole R. Moshang, of counsel and on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Plaintiff Brian Rodgers appeals the trial court's directed verdict for third-party defendant Parker-Hannifin Corporation (Parker), denying plaintiff the requested release of escrow funds. We affirm.

I.

On August 25, 2000, three agreements were executed between Nycoil Company ("Nycoil" or "the Seller") and N-C Acquisition, LLC ("N-C" or "the Buyer"). In the Lease Agreement (Lease), N-C leased Nycoil's property in Fanwood (Premises) from Stormcrest, Ltd. (Stormcrest), an affiliate of Nycoil.[1] The Lease also contained an option to purchase the Premises. In the Asset Contribution Agreement (ACA), Nycoil transferred its assets, as a capital contribution, to N-C. Section 1.5(c) of the ACA provided that

[1] Stormcrest was the partnership of plaintiff's family members which owned the property. Plaintiff was the sole owner of Nycoil.

$300,000 would be put in escrow "pursuant to an Escrow Agreement," and "disbursed in accordance with the Escrow Agreement."

The Escrow Agreement (EA), was entered between Nycoil, N-C, and the escrow agent Farer Fersko PA.[2] Under Section 2(a) of the EA, Nycoil agreed to deposit $300,000 "to be held by the Escrow Agent in accordance with and pursuant to the terms of this Escrow Agreement, as security for the performance by the Seller of the Seller's obligations under Section 4.4 of the [ACA] ("the Environmental Obligations")." Section 4.4(a) of the ACA provided:

> The Seller, in the name of the owner of the [Premises], Stormcrest, Ltd., has applied for and received a Remediation Agreement ("RA"), from the Industrial Site Evaluation Element or its successor (the "Element") of the New Jersey Department of Environmental Protection or its successor ("NJDEP"), authorizing the Seller to transfer title to the Assets to the Buyer prior to the Seller receiving from the Element either an approval of a Negative Declaration, an approval of a Remedial Action Workplan and a No Further Action Letter ("NFA") and a Covenant Not to Sue ("Covenant") pursuant to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., and the regulations promulgated thereunder ("ISRA").
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> [(emphasis added).]

Section 4.4(g) requires that "[f]ollowing the Closing, the Seller shall cause Stormcrest, Ltd., to promptly and diligently pursue

[2] Farer Fersko and its shareholders David B. Farer, Jack Fersko, and Richard J. Fresson are referred to as "defendants."

and obtain, and to deliver to the Buyer, an approval by NJDEP of a Negative Declaration or a No Further Action Letter, as the case may be pursuant to . . . ISRA and this Agreement." Section 4.4(k) speaks of "the Seller's delivery to the Buyer of a Negative Declaration or an NFA and a Covenant." Section 2(c) of the EA provides: "The Escrow Agent shall deliver the Escrow Fund to the Seller upon Buyer's receipt from the Seller of a No Further Action Letter for soil and groundwater contamination issued by the [NJDEP] pursuant to [ISRA][.]"

N-C defaulted under the Lease and was sued by Stormcrest. In their 2004 settlement, N-C relinquished its option to renew its lease or purchase the premises. In 2007, N-C was acquired by Parker. Plaintiff is the successor-in-interest to Nycoil.

On January 6, 2010, the New Jersey Department of Environmental Protection (DEP) issued Raymond Rodgers of Stormcrest a "Conditional No Further Action Letter with Requirements for Biennial Certifications." The letter stated that "[b]ecause concentrations of contaminants remain above the Ground Water Quality Standards" (standards), "a Classification Exception Area (CEA) and a Well Restriction Area (WRA) were "required, at this time, as institutional controls" for the area around monitoring well MW-3. As a result, "ground water uses within this area are

suspended for the duration of the CEA." The "CEA and WRA apply to 1,1-Dichloroethene only" (DCE).[3]

The letter stated: "The duration of the CEA and WRA is set at 5.5 years from the date of this letter." The letter provided "the expiration of the 5.5 year period prior to contaminant concentrations reaching the [standards] would not constitute approval to utilize the ground water," and Stormcrest would be required to conduct ground water sampling to show compliance with the standards.

The letter provided: "To remain in compliance with the terms of this Conditional No Further Action Letter, Stormcrest Limited Partnership as well as each subsequent owner, lessee and operator must comply with the conditions noted below." These conditions required Stormcrest and its successors to "conduct monitoring for compliance and effectiveness of the institutional control(s) specified in this document and submit written biennial certifications to [NJDEP] that the institutional control(s) is being properly maintained"; "comply with the provisions of" the CEA; and "properly decommission all monitoring wells installed as

[3] The conditional NFA letter noted "the ground water at this site" also exceeded the standards for other contaminants, "including benzene, toluene, xylene, and methyl tert-butl ether (MBTE)," but those contaminants were "from a source unrelated to this site," and would be addressed separately.

part of a remediation that will no longer be used for ground water monitoring. . . . in accordance with the requirements of N.J.A.C. 7:90-3.1 (et seq.)."

On August 24, 2012, plaintiff filed in the Superior Court a complaint against defendants seeking release of the escrow funds. Defendants interpleaded Parker.[4] A bench trial was held on April 2, 2014. At the end of plaintiff's case, the trial court granted a directed verdict in favor of defendants, finding plaintiff "has not proven he's entitled to the $300,000 at this time." The court cited plaintiff's admission that the property still had hazardous waste in excess of applicable remediation standards. The court ruled that, although an NFA could have "some tail to it," the conditional NFA was not a valid NFA because "the conditions haven't been met." As a result, there was no "viable covenant not to sue," because "it's not presently consistent" and it requires "monitoring for five-and-a-half years." The court noted the property and plaintiff "still have a hazardous substance" and groundwater "that cannot be used."

Parker filed a motion seeking counsel fees and costs. On September 18, 2015, the trial court entered an order denying with prejudice plaintiff's "claim that the January 6, 2010 Conditional

[4] Defendants also interpleaded plaintiff's brother Raymond Rogers, but neither he nor defendants appeared at trial.

No Further Action letter satisfies the terms for the release of the escrow funds," and entering final judgment in favor of Parker "on said claim"; providing that "[n]otwithstanding the foregoing, this Order is without prejudice to the parties' right to seek the release of the Escrow Funds in the future"; and granting Parker $29,681 in counsel fees. On October 23, 2015, another Law Division judge denied plaintiff's motion for reconsideration. Plaintiff appeals those two orders.

II.

Under the directed verdict rule, a party may make a "motion for judgment . . . at the close of the evidence offered by an opponent." R. 4:40-1. "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied.'" Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016) (citation omitted); accord Dolson v. Anastasia, 55 N.J. 2, 5 (1969). "In reviewing . . . a motion for judgment under Rule 4:40-1, [appellate courts] apply the same standard that governs the trial courts." Smith, 225 N.J. at 397. We must hew to that standard of review.

III.

The validity of plaintiff's demand for the release of the escrowed funds depends on an interpretation of the parties' agreements. "When, as here, there are no material factual disputes, 'the interpretation of a contract is subject to de novo review by an appellate court.'" In re Cty. of Atl., 230 N.J. 237, 255 (2017) (quoting Kieffer v. Best Buy, 205 N.J. 213, 222 (2009)).

"It is well-settled that '[c]ourts enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract."' A reviewing court must consider contractual language '"in the context of the circumstances' at the time of drafting[.]"'" Cty. of Atl., 230 N.J. at 254 (citations omitted). Courts "should give contractual terms 'their plain and ordinary meaning,' unless specialized language is used peculiar to a particular trade, profession, or industry." Kieffer, 205 N.J. at 223 (citations omitted).

Here, the parties entered into simultaneous agreements which cross-reference each other. The agreements also referenced and incorporated statutory and regulatory provisions and language. Thus, we must consider all the agreements together, and construe them in light of the referenced statutory and regulatory provisions as they existed at the time of the agreements.

As plaintiff and Parker succeeded to the obligations of Nycoil and N-C, respectively, the agreements provide in effect as follows. The EA's Section 2(a) provides the $300,000 was held as security for plaintiff's performance of his environmental obligations under the ACA's Section 4.4(a). Section 4.4(a) requires plaintiff to obtain an NFA pursuant to ISRA. The EA's Section 2(c) provides the escrowed funds shall be delivered to plaintiff when plaintiff provides Parker with an NFA issued by NJDEP pursuant to ISRA.

Plaintiff argues he satisfied the condition for the release of the escrowed funds when he obtained the January 6, 2010 conditional NFA letter. Plaintiff says that letter meets ISRA's statutory definition of an NFA letter set forth in N.J.S.A. 13:1K-8.[5] At the time of the agreements, ISRA defined a "No further action letter" as:

> a written determination by the [NJDEP] that, based upon an evaluation of the historical use of the industrial establishment and the

[5] Plaintiff has not renewed his argument to the trial court that it should instead apply the definition of an NFA letter found in N.J.A.C. 7:26B-1.4, which, unlike the definition of an NFA letter in the statute and the other ISRA regulation, adds the sentence: "The Department may issue a 'no further action letter' if hazardous substances or hazardous wastes remain on the industrial establishment or any other property with appropriate engineering and institutional controls." Compare N.J.A.C. 7:26B-1.4 (2000) with N.J.S.A. 13:1K-8 (2000) and N.J.A.C. 7:26C-1.3 (2000); accord N.J.S.A. 58:10B-1 (2000); N.J.S.A. 58:10B-26 (2000). In any event, plaintiff has not shown the parties or NJDEP were guided by this regulation rather than the statute and the other regulation, or explained why NJDEP nonetheless issued a "conditional" NFA letter.

> [Premises], or of an area of concern or areas of concern, as applicable, and any other investigation or action the department deems necessary, there are no discharged hazardous substances or hazardous wastes present at the site of the industrial establishment, at the area of concern or areas of concern, or at any other site to which discharged hazardous substances or hazardous wastes originating at the industrial establishment have migrated, and that any discharged hazardous substances or hazardous wastes present at the industrial establishment or that have migrated from the site have been remediated in accordance with applicable remediation regulations.
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> [N.J.S.A. 13:1K-8 (2000) (emphasis added).]

Thus, as defined by N.J.S.A. 13:1K-8 (2000), an NFA letter could not be issued unless there were no hazardous substances present and any such substances had been remediated.

Those prerequisites for an NFA letter had not been met here. According to the conditional NFA letter, "concentrations of [DCE] contaminants remain above the [standards]," and that hazardous substance had not been remediated. Rather, the conditional NFA letter required future remediation.

Under ISRA, "'[r]emediation' or 'remediate' means all necessary actions to investigate and cleanup or respond to any known, suspected, or threatened discharge, including, as necessary, the preliminary assessment, site investigation, remedial investigation and remedial action." N.J.S.A. 13:1K-8 (2000) (emphasis added).

> "Remedial investigation" means a process to determine the nature and extent of a discharge of hazardous substances or hazardous wastes at an industrial establishment . . . , and may include data collection, site characterization, sampling, monitoring, and the gathering of any other sufficient and relevant information necessary to determine the necessity for remedial action and to support the evaluation of remedial actions if necessary[.]
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> [Ibid. (emphasis added).]

The ISRA regulations provided that "'Remedial action' means those actions taken at a contaminated site as may be required by the Department, including . . . institutional controls . . . designed to ensure that any contaminant is remediated in compliance with the applicable remediation standards[.]" N.J.A.C. 7:26E-1.8 (2000) (emphasis added). "Institutional controls" are

> a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at the site at levels above the applicable remediation standard which would allow for the unrestricted use of the property. Institutional controls may include . . . natural resource use restrictions, well restriction areas, [and] classification exception areas[.]
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> [Ibid. (emphasis added).]

Thus, even though the conditional NFA letter "acknowledge[d] the completion of . . . Remedial Investigation and Remedial Action," the letter required additional remedial investigation and

"Remedial Action," including monitoring, institutional controls, groundwater use restrictions, a WRA, and a CEA. As a result, when the letter was issued in 2010, remediation had not occurred because the hazardous substance on the property exceeded safety standards, and because the letter imposed future remediation measures. The ACA's Section 4.4 showed the parties' understanding that the imposition of such institutional controls would constitute remediation and would show remediation was not complete. Section 4.4(a) provides: "The Seller shall have the right to cause the Remediation to be completed in the most cost effective manner possible acceptable to NJDEP, including, without limitation, the use of engineering and institutional controls, or through the use of a groundwater classification exception area or well restricted area." Section 4.4(h) provides that "'Remediation' shall have the meaning ascribed to such term under [ISRA] and shall include . . . environmental investigation, monitoring and sampling; installation, maintenance and removal of monitoring wells; . . . and any other work required by the NJDEP."

As the conditional NFA letter required future remediation to remedy the hazardous substance still present on the property, the conditional NFA letter was not an NFA letter issued "pursuant to [ISRA] and the regulations issued thereunder," as required by the

EA's Section 2(c).[6] Therefore, the conditional NFA letter did not satisfy that section's requirement for the release of the escrowed funds. Accordingly, plaintiff's claim fails under the plain language of the parties' agreements which incorporated ISRA. "'[I]f the contract into which the parties have entered is clear, then it must be enforced' as written." Cty. of Atl., 230 N.J. at 254 (citation omitted).

Plaintiff's claims also fail if we consider "'the underlying purpose of the contract.'" Ibid. (citation omitted). The EA's Background Section pointed out that: the seller and buyer of Nycoil's assets had entered into the ACA; "[p]ursuant to Section 4.4 of the [ACA], the Seller has certain post-closing obligations with respect to certain environmental matters"; and "[p]ursuant to Section 4.4 of the [ACA]," $300,000 "is to be deposited in escrow with the Escrow Agent upon the Closing." Based on this background, the EA said the parties "therefore" agreed to its terms. The EA's Section 2(a) made clear the escrow was "security for the performance by the Seller of the Seller's [environmental] obligations under Section 4.4 of the [ACA]." The self-evident

[6] Plaintiff argues the conditional NFA letter was a "limited restricted use no further action letter," but when the letter was issued that concept had not been introduced into the regulations. Compare N.J.A.C. 7:26C-7.6(a)(2) (2012) with N.J.A.C. 7:26C-7.6 (2010). Moreover, NJDEP stated it was a "conditional" NFA letter.

purpose of the escrow was to ensure the seller and its successor plaintiff completed their post-closing environmental obligations. The conditional NFA letter made clear that the environmental problems and obligations remained. Distributing the escrowed funds before the problems were removed and the obligations were met would leave the buyer and its successor Parker without the protection the parties intended the escrow to provide.

Plaintiff argues the conditional NFA letter's requirements for institutional controls were consistent with the requirement for an NFA letter "that any discharged hazardous substances . . . have been remediated in accordance with applicable remediation regulations." N.J.S.A. 13:1K-8 (2000). He emphasizes a portion of a regulation providing NJDEP may establish a CEA "only when [NJDEP] determines that constituent standards for a given classification are not being met or will not be met in a localized area." N.J.A.C. 7:9C-1.6(a) (2009) (plaintiff's emphasis). However, the conditional NFA letter made clear that standards "[we]re not being met." Ibid.

Plaintiff also cites a former regulation that required NJDEP to issue an NFA letter if it determined that:

> i. Based upon either a preliminary assessment or site investigation, no further remediation is required at any part of the site [or each of the areas of concern] because the entire site has been investigated . . . ;

> ii. Based upon the completion of all remediation, any contamination which had been present at the site [or the area of concern] has been remediated in accordance with the unrestricted use remediation standards; or
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> iii. Based upon the completion of all remediation, no further remediation in necessary for the site [or for the area of concern], but that all subsequent use of the site must be consistent with any recorded deed notices, groundwater classification exception area or other institutional controls and engineering controls applicable to the site[.]
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> [N.J.A.C. 7:26C-2.6(a)(1) (2000) (emphasis added).]

For the reasons above, subsections (i) and (ii) did not apply here. Nonetheless, plaintiff claims subsection (iii) allowed an NFA letter to issue even though contamination remained on the property and institutional controls such as a CEA were in place. However, subsection (iii) would apply only "upon the completion of remediation" and NJDEP's finding that "no further remediation is necessary." Ibid. Here, the conditional NFA letter found further remediation was necessary because the DCE contamination exceeded standards and prevented groundwater usage.[7]

[7] Plaintiff also cites Section 4.4(k), which provides that following the Seller's delivery to the Buyer of "an NFA and a Covenant," the Buyer shall "undertake all bi-annual certifications that may be required concerning engineering and institutional controls established with respect to the Leased Premises only so long as the controls are in the form of a cap." Because the controls here were not "in the form of a cap," this provision is

Even if a conditional NFA letter whose conditions are met is the equivalent of an NFA letter, plaintiff's 2014 testimony showed that the conditions of the conditional NFA letter had not been met. The conditional NFA letter required (a) monitoring of well MW3, (b) submission of biennial certifications to NJDEP, (c) compliance with the CEA, and (d) decommissioning of all other wells. However, plaintiff testified (a) only one or two tests had occurred after January 6, 2010, and no testing had been done since "2011 or 2012"; (b) the testing showed DCE was still present at levels exceeding the standards; (c) that after the first biennial certification around October 1, 2011, no other biennial certifications had been submitted; and (d) the other wells were merely "ready to be backfilled and closed out." Cf. N.J.A.C. 7:9D-3.1 to -3.5 (setting the requirements for decommissioning wells). When asked if Stormcrest was in compliance with the conditional NFA letter, plaintiff replied: "Apparently not."

Plaintiff notes the trial court's oral opinion contained conflicting language that the conditional NFA letter "complies with the [ISRA] definition" but "I don't think the parties intended to rely upon a no further action letter as being the determining event" to justify release of the escrow. Nonetheless, our de novo

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inapplicable. In any event, as set forth above, plaintiff did not deliver "an NFA," only a conditional NFA letter.

review has shown the conditional NFA was not an NFA letter as defined in ISRA. In any event, we agree with the trial court that this conditional NFA letter was inadequate to require release of the escrow, particularly as plaintiff failed to meet its conditions.

Plaintiff next contends that the trial court impermissibly referenced Section 4.4 of the ACA to interpret the EA. However, the EA's Background Section expressly stated the escrow was created "[p]ursuant to Section 4.4 of the [ACA]," and the EA specifically incorporates the terms of the ACA in Section 2(a). The EA stated the escrow was "security for the performance by the Seller of the Seller's obligations under Section 4.4 of the [ACA]." Because the parties explicitly incorporated Section 4.4 of the simultaneously-executed ACA into the EA, the court could consider Section 4.4 in construing the EA, including the EA's Section 2(c).

Plaintiff argues the parol evidence rule bars consideration of the ACA's Section 4.4 because the EA has an integration clause stating the EA "contains the entire agreement between and among the Seller, the Buyer and the Escrow Agent with respect to the Escrow Fund." However, we must read this language in light of the explicit references to Section 4.4 of the ACA in the EA's Background Section and Section 2(a), together with the reference to the EA in Section 1.5(c) of the ACA. Those references make

clear that the EA was drafted simultaneously with the ACA, that each agreement was part of the consideration for the other, and the EA was intended to ensure implementation of the ACA's Section 4.4. If "one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together." Linzer, Corbin on Contracts § 25.9[A], at 103 (rev. ed. 2010) (quoting 2 Williston, The Law of Contracts § 637, at 1234 (1920)).

Moreover, "the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document," but New Jersey courts take "an expansive view" and "permit a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties." Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 268-70 (2006). Thus, "'[e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement.'" Id. at 269 (citation omitted). "Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated[.]" Restatement (Second) of Contracts, § 214 (Am. Law Inst. 1981). That remains true even though the EA's Section 2(a) and the ACA's Section 1.5(c) state the escrow shall be held and disbursed,

respectively, "in accordance with the terms of the Escrow Agreement."

In any event, the result would be the same even if we ignored the ACA. As set forth above, the conditional NFA letter did not meet Section 2(c)'s requirement of "a No Further Action Letter for soil or groundwater contamination issued by [NJDEP] pursuant to [ISRA] and the regulations promulgated thereunder."

Thus, we need not rely on the trial court's alternative basis for refusing to release the escrow, namely that the ACA's Section 4.4 also required plaintiff to obtain a covenant not to sue. We merely note our uncertainty whether a covenant not to sue exists here. Plaintiff states that, "[w]henever . . . [NJDEP] issues a no further action letter pursuant to a remediation," the law in 2000 required NJDEP to issue a separate covenant not to sue, L. 1997, c. 278, § 6(a), and the law after 2009 provided the person "shall be deemed by operation of law to have received a covenant not to sue," N.J.S.A. 58:10B-13.1(a). However, as set forth above, NJDEP never issued an NFA within the meaning of ISRA, instead issuing a conditional NFA whose conditions were never fulfilled. See also ibid. ("The covenant remains effective only for as long as the real property for which the covenant was issued continues

to meet the conditions of the no further action letter."); accord L. 1997, c. 278, § 6(a).[8]

IV.

Plaintiff next argues that performance is impossible and that the purpose of the EA has been frustrated.

> The respective concepts of impossibility of performance and frustration of purpose are, in essence, doctrinal siblings within the law of contracts. Both doctrines may apply to certain situations in which a party's obligations under a contract can be excused or mitigated because of the occurrence of a supervening event. The supervening event must be one that had not been anticipated at the time the contract was created, and one that fundamentally alters the nature of the parties' ongoing relationship.
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> [JB Pool Mgmt. v. Four Seasons at Smithville Homeowners Ass'n, 431 N.J. Super 233, 245 (App. Div. 2013) (emphasis added).]

"Both the impossibility and frustration doctrines are concerned with '[a]n extraordinary circumstance [that] may make performance [of a contract] so vitally different from what was reasonably to be expected as to alter the essential nature of that performance.'" Ibid. (quoting Restatement (Second) of Contracts, ch. 11, intro. note at 309 (Am. Law. Inst. 1981)) (emphasis added).

[8] Moreover, the conditional NFA letter reserved "all rights against Stormcrest Limited Partnership with respect to liability for costs, injunctive relief, and damages" both "for injury to, destruction of, or loss of natural resources," and for "MTBE contamination."

A.

First, Plaintiff argues performance is impossible because NJDEP does not issue NFA letters anymore. The doctrine of impossibility of performance "excuses a party from having to perform its contract obligations, where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties." Id. at 246.

Plaintiff points to the enactment of the Site Remediation Reform Act (SRRA), largely codified at N.J.S.A. 58:10C-1 to -29, which became effective May 7, 2009. L. 2009, c. 60, § 56. The SRRA "changed the mechanism for remediation projects by placing the bulk of oversight duties in the hands of licensed site remediation professionals (LSRPs) and retaining only minimal oversight responsibilities for the [NJ]DEP." Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 400 (2014) (footnote omitted). "The former resolution of a spill cleanup — the NJDEP's issuance of a 'no further action' letter — has been replaced by the rendering of findings by an LSRP who, upon finding a site to be clean so advises the NJDEP, which may thereafter conduct its own confirmatory examination." Matejek v. Watson, 449 N.J. Super. 179, 182 (App. Div. 2017). The LSRP's findings are embodied in a

response action outcome (RAO) letter which the LSRP provides to the person responsible for remediation and files with NJDEP when "the site has been remediated." N.J.S.A. 58:10C-14(d).

The SRRA adopted, and incorporated into ISRA, identical definitions of "Response action outcome" letter as

> a written determination by a licensed site remediation professional that the contaminated site was remediated in accordance with all applicable statutes and regulations, and based upon an evaluation of the historical use of the site, or of any area of concern at that site, as applicable, and any other investigation or action [NJDEP] deems necessary, there are no contaminants present at the site, or at any area of concern, at any other site to which a discharge originating at the site has migrated, or that any contaminants present at the site or that have migrated from the site have been remediated in accordance with applicable remediation regulations, and all applicable permits and authorizations have been obtained.
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> [N.J.S.A. 58:10C-2 (emphasis added); accord N.J.S.A. 13:1K-8.]

Given that a "contaminant" is defined as a "discharged hazardous substance" or "hazardous waste," N.J.S.A. 58:10C-2, this definition of an RAO bears striking similarities to the definition of an NFA letter in N.J.S.A. 13:1K-8 (2000).

An RAO letter serves similar purposes as a NFA letter under ISRA, N.J.S.A. 13:1K-9(b)(2), -9(d)(2), and under other statutes affected by SRRA, N.J.S.A. 58:10-23.11g(e); N.J.S.A. 58:10B-11(a);

N.J.S.A. 58:10B-13.1, -13.2. The SRRA amendments treat both an NFA letter and an RAO as a "Final remediation document." N.J.S.A. 58:10-23.11b; accord N.J.S.A. 58:10B-1. Indeed, plaintiff testified an RAO letter was the equivalent of an NFA letter.

Plaintiff has failed to show that performance of the EA's Section 2(c) has been rendered "literally impossible" or "inordinately more difficult" by the SRRA's change in nomenclature from an NFA letter to an RAO letter, its shift of the issuer of the letter from NJDEP to an LSRP, or otherwise. JB Pool Mgmt., 431 N.J. Super. at 246. To the contrary, the SRRA was intended to cut bureaucratic red tape and "further improve the efficiency and speed with which environmental sites are remediated." Des Champs Labs., Inc. v. Martin, 427 N.J. Super. 84, 99 (App. Div. 2012).

Plaintiff notes NJDEP may invalidate an RAO letter if NJDEP "determines that the remedial action is not protective of public health, safety, or the environment." N.J.S.A. 58:10C-22. However, NJDEP has had the power to rescind an NFA letter since before the issuance of the conditional NFA letter. N.J.A.C. 7:26C-6.4 (2009). In any event, the EA's Section 2(c) only requires that plaintiff obtain such a letter, not that it be non-rescindable.

Plaintiff also cites a proviso that NJDEP "shall not issue covenants not to sue after the issuance of licenses to site

remediation professionals pursuant to [N.J.S.A.] 58:10C-12[.]" N.J.S.A. 58:10B-13.1(f)(1). However, the SRRA provides that after an LSRP issues a RAO letter to the person responsible for remediation, "the person shall be deemed, by operation of law, to have received a covenant not to sue with respect to the real property upon which the remediation has been conducted." N.J.S.A. 58:10B-13.2(a). In any event, plaintiff contends, and we assume without deciding, that the EA's Section 2(c) allows the release of the escrow if plaintiff obtains such a letter, regardless of whether he also obtains a covenant not to sue.

Thus, plaintiff has not shown that enactment of the SRRA made "'performance [of the EA's Section 2(c)] so vitally different from what was reasonably to be expected as to alter the essential nature of that performance.'" JB Pool Mgmt., 431 N.J. Super. at 245 (citation omitted). As plaintiff can still receive the equivalent RAO letter, performance is not impossible.

B.

Plaintiff argues the purpose of the EA was frustrated because Parker's predecessor N-C entered into a settlement agreement waiving its option to purchase the Premises under the Lease and shortly thereafter vacated the Premises. However, the EA made no reference to the Lease. In requiring the escrow, the EA referenced only the ACA under which Nycoil sold its assets to N-C, and made

plain the escrow was created "as security for the performance by the Seller of the Seller's obligations under Section 4.4 of the [ACA]." Section 4.4 of the ACA likewise referenced only the sale of assets and the closing on that sale. Neither the EA nor the ACA made any mention of the option under the Lease for N-C to purchase the Premises. Nothing in the EA or the ACA conditioned the requirement of an NFA letter on N-C's purchase, occupation, or operation of the Premises.

Plaintiff argues N-C had no need for an NFA if it did not occupy, operate on, or purchase the Premises. However, no such condition was placed on the requirement that Nycoil and its successors supply N-C and its successors with an NFA letter. Moreover, N-C operated the business on the Premises for about four years, and thus subjected itself and its successors to obligations under ISRA as an "operator" even if it never became an "owner." See, e.g., N.J.S.A. 13:1K-8, -9, -13. An "operator" may also be a "Person responsible for conducting the remediation" under the Spill Act. N.J.S.A. 58:10-23.11b.

Plaintiff notes that other provisions of the Lease and ACA allocate responsibility to Nycoil and state it must provide limited indemnification. Plaintiff also cites provisions of ISRA allowing a tenant to petition NJDEP to make the landlord responsible for ISRA compliance. N.J.S.A. 13:1K-11.9; N.J.A.C. 7:26B-10(e), (f).

However, if NJDEP finds a lease is not clear, it can still compel compliance from the tenant, N.J.A.C. 7:26B-10(g). Moreover, the applicable regulation preserves the liability of a tenant who was also an operator: "notwithstanding [N.J.A.C. 7:26B-10](e), (f) and (g) . . . both the owner and operator are strictly liable without regard to fault, for compliance with ISRA and this chapter." N.J.A.C. 7:26B-1.10(a). In any event, the buyer was not content to rely on those provisions, and also required the seller to provide an NFA letter.

Plaintiff also misapprehends the frustration of purpose doctrine:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
>
> [Restatement, § 265 (emphasis added); see JB Pool Mgmt., 431 N.J. Super. at 246.]

This doctrine allows a party to seek discharge of the party's duties if that party's purpose has been frustrated. See, e.g., Restatement, § 265 at illus. 1-4. The doctrine does not allow plaintiff to seek discharge of his duties by claiming frustration of the purpose of the other party which still desires performance, as Parker does. Nothing has frustrated Nycoil's general purpose

of incentivizing the asset sale by promising to get an NFA, or plaintiff's particular purpose of obtaining the escrowed funds by performing that inherited duty.[9]

In any event, to show frustration of purpose, a party must demonstrate that "a change in circumstances makes one party's performance worthless to the other, frustrating his purpose in making the contract. The frustration must be so severe that it is not fairly to be regarded as the risks that [the party claiming frustration] assumed under the contract." JB Pool Mgmt., 431 N.J. Super. at 246-47 (quoting Restatement, § 265 at cmt. (a)). In the Lease, Nycoil and its successors assumed the risks that N-C would not invoke its "option" to purchase the Premises or its "option to renew" the Lease after four years. Moreover, as set forth above, plaintiff did not show his performance would be worthless to Parker. Finally, there is obvious worth for plaintiff to comply with his obligation to remediate the Premises sufficiently to obtain an NFA letter or the equivalent RAO letter.

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[9] The classic example of frustration of purpose is that a person who leases a room with the purpose to see a parade is excused from paying rent if the parade is cancelled. Restatement, § 265 at illus. 1; JB Pool Mgmt., 431 N.J. Super. at 247. If the person wants to lease the room despite the cancellation, the lessor cannot refuse to lease the room by claiming the person's purpose was frustrated, where the cancellation did not frustrate the lessor's purpose of receiving the rent. Cf. Edwards v. Leopoldi, 20 N.J. Super. 43, 55 (App. Div. 1952) ("It is their common object that has to be frustrated").

We agree with the trial court's conclusion that plaintiff's instant complaint and trial testimony failed to show an entitlement to the escrowed funds. Like the trial court, we rule without prejudice to plaintiff filing a new complaint after he has obtained an NFA letter or an RAO letter.

Affirmed.