SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2592-15T1

BASF CORPORATION, COLUMBIAN CHEMICALS COMPANY, GLENN SPRINGS HOLDINGS, INC., SHELL OIL COMPANY, TREXTRON, INC., and TRANE US, INC., f/k/a TRANE, INC., f/k/a AMERICAN STANDARD, INC.,

Plaintiffs-Respondents

v.

THE ESTATE OF DONALD W. JONES, SR., JONES INDUSTRIAL SERVICE COMPANY, a/k/a JIS INDUSTRIAL SERVICE CO., a/k/a J.I.S. CO., DONALD W. JONES, JR., and ALBERT JONES,

Defendants-Appellants,

and

DONNA JONES and RAYMOND R. WISS, ESQ.,

Defendants.

Argued November 27, 2017 - Decided February 1, 2018

Before Judges Accurso, O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. C-000203-14.

R.S. Gasiorowski argued the cause for appellants (Gasiorowski & Holobinko, attorneys; R.S. Gasiorowski, on the brief).

Irvin M. Freilich argued the cause for respondents (Gibbons PC, attorneys; Irvin M. Freilich, Shawn M. LaTourette, and David J. Miller, on the brief).

PER CURIAM

Defendants Jones Industrial Service Company (JIS), the Estate of Donald W. Jones, Sr., Donald W. Jones, Jr., and Albert Jones[1] appeal from a 2016 final judgment in favor of plaintiffs, BASF Corporation, Columbian Chemicals Company, Glenn Springs Holdings, Inc., Shell Oil Company, Textron, Inc. and Trane US, Inc., enforcing the parties' 2009 federal court settlement. Defendants claim:

> THE TRIAL COURT'S SUMMARY RULING — DENYING THE DEFENDANTS THE PAYMENT OF THE $718,000 CONSIDERATION IN THE ESCROW DEED WHILE MANDATING THE DEFENDANTS VACATE AND DEED THEIR BUSINESS PROPERTY — WAS PROCEDURALLY INVALID AND SUBSTANTIVELY IN ERROR.
>
> THE COURT'S SUPPLEMENTAL ORDER REQUIRING THE DEFENDANTS' EXECUTION OF AN AMENDED DEED

[1] Raymond R. Wiss, Esq. is not a party to this appeal. The claims against Mr. Wiss, who was made a defendant solely in his role as escrow agent, were dismissed with prejudice by the trial judge, whose order has not been appealed. Ms. Jones filed a notice of appeal, but has failed to pursue it, and we ordered her brief suppressed.

> STATING THE CONSIDERATION AS $1.00, AND AN AFFIDAVIT OF CONSIDERATION STATING THE SAME, WOULD REQUIRE THE EXECUTION OF INACCURATE DOCUMENTS IN VIOLATION OF LAW.
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> THERE WERE ISSUES OF EQUITABLE FRAUD AND MISREPRESENTATION IN THE INDUCEMENT OF THE 2009 [SETTLEMENT AGREEMENT] THAT WERE ERRONEOUSLY DECIDED ON DISPUTED FACTS IN A SUMMARY PROCEEDING AND WITHOUT PROPER HEARING/TRIAL.
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> THE INACCURATE 2012 DEED NOTICE PREPARED BY PLAINTIFFS AND EXECUTED BY J.I.S. (DONALD JONES) WAS INVALID AND PROVIDES A FURTHER BASIS FOR A PLENARY HEARING AND POSSIBLE RESCISSION OF THE SETTLEMENT AGREEMENT.
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> THE TRIAL COURT FOLLOWED A DEFICIENT AND IMPROPER SUMMARY PROCESS WHICH RESULTED IN ERRONEOUS AND UNSUPPORTED FINDINGS AND A DENIAL OF DEFENDANTS' RIGHTS TO DUE PROCESS AND A PLENARY HEARING.

Because our review of this record convinces us Judge McCormick was correct in finding that all of defendants' various claims for disavowing their 2009 federal court settlement are utterly without merit and properly addressed in a summary proceeding, we affirm.

JIS operated a hazardous waste landfill in South Brunswick from 1955 until 1980, when the State succeeded in closing it down. See In re Jones Indus. Serv. Co. Landfill, 110 N.J. 101 (1988). In 1983 the United States Environmental Protection Agency designated the property a Superfund site. Plaintiffs, generators or transporters of hazardous waste dumped at the

landfill on plaintiffs' property, were pursued by regulators, including New Jersey's Department of Environmental Protection, to remediate the site.

In 2006, plaintiffs sued JIS, its directors and shareholders, the individual defendants, in federal court in New Jersey to recover their remediation costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the New Jersey Spill Compensation and Control Act (Spill Act). After prolonged negotiations, during which both sides were represented by experienced counsel, the parties settled that suit in 2009 by entering into a thirty-four page settlement agreement and a stipulation and consent order for settlement.

Warranting they were without sufficient assets to pay their share of response costs, defendants agreed to transfer the property to plaintiffs in exchange for plaintiffs' agreement to dismiss the CERCLA action and assume all responsibility for the past and future costs necessary to remediate the landfill. Because defendants needed time to pay down an outstanding mortgage on the property and move their business operations elsewhere, the parties agreed to a December 31, 2011 closing date, which defendants had the right to extend one year. Defendants agreed to pay all real estate taxes until closing,

and plaintiffs agreed to assume responsibility for the realty transfer fee. Defendants promised to transfer the property on the closing date unencumbered by liens or mortgages and free of debris, and they agreed to secure those obligations by executing a note secured by a mortgage on other property and confessions of judgment to be held in escrow, along with an executed deed, pending the closing date. Finally, plaintiffs were permitted ninety days to inspect the property for contamination not previously identified by the EPA or DEP, which, if found, would permit them to void the agreement.

As counsel for plaintiffs would later certify to the trial court, plaintiffs retained real estate counsel to advise them on the transfer of the property. Noting there was no consideration listed in the draft deed, plaintiffs' real estate counsel advised plaintiffs the county clerk would not record a deed without a consideration listed because of the realty transfer fee. Based on his advice, plaintiffs inserted the property's assessed value, $718,000, as the consideration stated in the deed, and it was signed by Donald Jones, Jr., president of JIS, and placed in escrow.

Following execution of the settlement documents, plaintiffs immediately retained an environmental consulting firm to inspect the property. The firm produced a Phase II Environmental Site

Assessment Report concluding there was approximately 2600 cubic yards of buried waste material beyond the nine-acre area capped in 2001. Notwithstanding this additional contamination, plaintiffs elected to proceed with the transaction. In 2010, the EPA advised plaintiffs it would require the recording of a deed notice, informing of the existence of the landfill cap. In January 2012, Donald Jones, Jr. executed the deed notice drafted by plaintiffs, and it was recorded and approved by DEP.

Defendants refused to transfer the property to plaintiffs on the extended closing date, claiming they had been unable to find an alternate site for their operations. When all efforts to persuade defendants to perform were exhausted, plaintiffs finally filed suit in federal court in 2014 to enforce the settlement. After the federal court declined to hear the action on the ground that its jurisdiction had expired, plaintiffs instituted this action in Superior Court.

Plaintiffs filed a verified complaint in the Chancery Division for specific performance of the settlement agreement, and shortly thereafter moved to proceed summarily pursuant to R. 4:67(1)(b). Defendants cross-moved to vacate the settlement agreement, claiming the federal court never inquired into the fairness of the settlement, that the state court should "determine whether the Spill Act's contribution provisions and

New Jersey law militate in favor of a determination that the defendants have paid in excess of their equitable share, and that the forfeiture of their property would be inequitable," that plaintiffs made material misrepresentations in forming the settlement agreement and inducing defendants' consent thereto, that the federal court judge threatened defendants with an adverse ruling if they did not agree to settle, and that the court should conduct a plenary hearing on the voluntariness of the settlement following discovery.

Based on the nature of the arguments defendants raised to vacate the settlement agreement, Judge McCormick determined comity demanded the federal court be permitted the opportunity to determine whether it would assume jurisdiction of defendants' motion to vacate the settlement. Accordingly, the judge instructed defendants to seek a hearing in federal court.

After the federal court again declined jurisdiction, the matter returned to Judge McCormick. In a clear and comprehensive opinion from the bench on June 18, 2015, Judge McCormick denied defendants' motion to void the settlement agreement. The judge found the motion, made well over five years after execution of the agreement, grossly out of time under R. 4:50-1, and that defendants' claims of misrepresentation were all known to them at the time they signed

the documents, leaving them no excuse for the delay. Finding "no reason why the complete resolution of this matter cannot be accomplished in short order," the judge granted plaintiffs' motion to proceed summarily.

Over five more hearing dates, a number of which were required to address defendants' various motions for reconsideration, Judge McCormick addressed, often more than once, each one of defendants' several claims that plaintiffs had failed to comply with the settlement agreement, making enforcement inequitable. Judge McCormick found the terms of the settlement agreement were clear and unambiguous, that the agreement was valid and enforceable in accordance with its terms and that defendants had not presented competent evidence of any failure to perform by plaintiffs.

As to defendants' argument that they were to be paid the $718,000 recited in the deed, Judge McCormick found "it did not even rise to the level of specious." Plaintiffs presented affidavits by the lawyers involved in the drafting of the documents explaining the $718,000 figure was inserted into the deed for purposes of the realty transfer fee only, and did not represent monies to be paid to defendants. Judge McCormick noted defendants failed to counter those proofs with their own affidavits. Instead she found it "instructive that all

defendants can present in support of their argument are hyper-technical legal and evidence arguments with no certification from any parties or attorneys involved in the . . . drafting and finalization of the settlement agreement and/or the deed." Because defendants failed to counter plaintiffs' proofs with any "contrary evidence creating [a] question of fact," Judge McCormick found no evidence to support defendants' claim for the $718,000 and no reason to conduct a plenary hearing on the issue.

As for the deed notice, Judge McCormick found no factual basis for defendants' claim that the notice prepared by plaintiffs and signed in 2012 by Donald Jones, Jr., was in any way inaccurate. More important, the judge found, relying on a 2015 letter from the DEP, that the DEP and EPA were aware of the 2600 cubic yards of contaminated soil outside the confines of the capped landfill, which plaintiffs discovered after execution of the settlement agreement. Judge McCormick concluded from the proofs, "supported by adequate certifications" that

> plaintiffs or their designee have two options with respect to this contaminated soil; they can put it under the landfill cap or they can remove it.
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> If they put it under the landfill cap the deed notice at that time will have to be amended. However, if they decide to remove the contaminated soil, or perhaps deal with

> in a — in a different way . . . the deed notice would not have to be amended. And the DEP is willing to wait until the property transfer and probably further investigation with a final decision by the plaintiffs or their assignee as to what is going to be done with the 2600 hundred cubic yards of contaminated soil and then the deed notice.
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> So, there is absolutely no reason at the present time any requirement, necessity or otherwise, to change the deed notice or amend it or to modify it.

We agree with the trial court that the competent evidence in the record does not support defendants' claim that plaintiffs' filing of the deed notice constituted a breach of their obligations under the settlement agreement. Because defendants failed to put any material fact on this issue in issue, we agree with Judge McCormick that no plenary hearing was required and the issue was properly resolved in a summary proceeding. See R. 4:67-5; Tractenberg v. Twp. of W. Orange, 416 N.J. Super. 354, 365 (App. Div. 2010).

Finally, we reject defendants' claim that the court erred in reforming the deed to reflect the actual consideration set forth in the settlement agreement. Defendants objected to signing and filing an affidavit of consideration reflecting the $718,000 when they had not received that sum. The court responded to their objection by ordering that the deed and

affidavit of consideration accurately reflect the actual consideration set forth in the settlement agreement. We see no error, much less reversible error, in the court's response to defendants' concerns about the accurate reporting of the consideration received.

Our review of this record leaves us with no doubt that Judge McCormick appropriately enforced the parties' 2009 settlement agreement in a summary proceeding pursuant to R. 4:67-2(b), and that defendants' claims to the contrary are utterly without merit. R. 2:11-3(e)(1)(E). We accordingly affirm substantially for the reasons expressed in Judge McCormick's several opinions from the bench enforcing the agreement.

Affirmed.