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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1218-10T1

MAGIC PETROLEUM CORPORATION,

Plaintiff-Appellant,

v.

EXXON MOBIL CORPORATION,
MARIE TIRICO,

Defendants-Respondents,

and

TRENTON OIL COMPANY and
M.M. WERTHEIM CORPORATION,

Defendants,

and

EXXON MOBIL CORPORATION,

Defendant/Third-Party
Plaintiff-Respondent,

v.

LINKING RING PETROLEUM,

Third-Party Defendant.

Telephonically Argued April 12, 2011 –
Decided July 26, 2011

Before Judges Lihotz and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3685-03.

Stuart J. Lieberman argued the cause for appellant (Lieberman & Blecher, P.C., attorneys; Mr. Lieberman, of counsel and on the briefs; Mara B. Epstein, on the briefs).

Robert T. Lehman argued the cause for respondent Exxon Mobil Corporation (Archer & Greiner, P.C., attorneys; Mr. Lehman, of counsel and on the brief; Adam P. Baas and Sarah A. Gribbin, on the brief).

Riker Danzig Scherer Hyland Perretti, L.L.P., attorneys for respondent Marie Tirico, join in the brief of respondent Exxon Mobil Corporation.

PER CURIAM

Plaintiff Magic Petroleum Corporation appeals from two Law Division orders. The first dismissed its complaint without prejudice and the second denied its request for reconsideration. Plaintiff's action against defendant ExxonMobil Corporation (Exxon) sought an allocation of liability for the cleanup of contamination, pursuant to the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24. Plaintiff argues the trial court erred by relying on the doctrine of primary jurisdiction and improperly deferring disposition of its claims until the New Jersey Department of Environmental Protection (DEP) concluded its efforts to delineate the necessary remediation of the spill site. Plaintiff additionally

asserts the trial court erred by improperly relying upon nonbinding precedent to reach its conclusions. See R. 1:36-3.

After careful consideration of the parties' arguments and applicable law, we agree with the trial judge's conclusion that the court's adjudication of the parties' Spill Act claims must abide the DEP's enforcement actions. We affirm.

These facts are taken from the motion record. Plaintiff owns property (Lot 19.01) located on County Route 537 (Monmouth Road) in Clarksburg, which is the site of a gasoline service station. Exxon owned realty (Lot 11) across the street from plaintiff's, at the intersection of County Routes 526 and 537, which also has been used as a retail gasoline service station.[1] Defendant Marie Tirico leased Lot 11 from Exxon and operated a gasoline station on the property from the early 1980s until 1988, when she purchased the lot from Exxon. Defendant Trenton Oil Company (TOC) purchased Lot 11 from Tirico and then third-party defendant Linking Ring Petroleum (LRP), which is owned by plaintiff's principal, bought the property from TOC. Other than Tirico, the defendants have not participated in this appeal.

[1] The exact dates of Exxon's ownership of Lot 11 are unclear. Exxon's third-party complaint states that Exxon "owned and leased [Lot 11] . . . from 1967 to 1987."

When plaintiff acquired Lot 19.01 in the early 1990s, it was aware the underground storage tank (UST) system was leaking petroleum hydrocarbons into the soil and groundwater. During this same period, Exxon's property also contained leaking USTs, releasing similar hazardous substances. A detailed history of the DEP's involvement with the site and the agency's interaction with plaintiff in pursuit of remediation of the environmental hazard on Lot 19.01 is found in the November 1, 2006, fifty-page written Initial Decision rendered by an administrative law judge (ALJ) in an agency enforcement action. We briefly highlight aspects of these reported events in order to provide context to the dispute now under review.

Beginning in 1995, the DEP contacted plaintiff after it identified strong petroleum odors and recorded elevated photo ionization detector readings on Lot 19.01, which constituted a "discharge," N.J.S.A. 58:10-23.11b. The DEP issued a Field Directive notifying plaintiff of the need to investigate and remediate the hazards discharged on Lot 19.01 and requiring specific investigative actions be performed, including the installation of groundwater monitoring wells, to remediate the contamination.

Plaintiff excavated several USTs that exhibited one-quarter inch holes believed to be a source of the hazardous discharge

and removed 200 tons of contaminated soil from Lot 19.01. The DEP advised plaintiff its efforts were untimely and insufficient because it had not properly conducted the soil and groundwater delineation required in the prior notice. Consequently, plaintiff's proposed remedial action workplan, submitted pursuant to N.J.A.C. 7:26E, was deemed unacceptable.

Discussions continued regarding the nature and extent of the cleanup efforts. On November 24, 1999, plaintiff and the DEP entered into an Administrative Consent Order (ACO) wherein plaintiff agreed to remediate Lot 19.01, under the DEP's oversight. Plaintiff was to perform soil and water sampling, install monitoring wells and continue field remediation activities, and take all necessary steps designed to mitigate, contain, cleanup and remove the discharge. N.J.A.C. 7:1E-5.7(a). The ACO contemplated plaintiff would apply for funding from the New Jersey Economic Development Authority (EDA) to effectuate the remediation. Plaintiff did not comply as agreed. Over the ensuing years, the DEP continued to notify plaintiff of its obligations and the possible assessment of penalties for non-compliance.

Also in 1999, with full knowledge of the faulty UST system, LRP acquired Lot 11 for the operation of a gasoline service

station. LRP is owned by Avinash Vashisht, who also owns and operates plaintiff.

Thereafter, plaintiff began asserting that notwithstanding the hazardous substance discharge and resultant soil and groundwater contamination from its USTs, it believed the bulk of the contamination on Lot 19.01 resulted from Exxon's discharged gasoline leaking from its UST on Lot 11, which gravitated from Lot 11 to Lot 19.01. Plaintiff believes Exxon is substantially responsible for the contamination investigation and cleanup costs for both lots and contested what it characterized as the DEP's efforts to make it solely responsible to remediate Lot 19.01.

From 1999 to 2001, the DEP and plaintiff exchanged correspondence regarding the inadequacy of plaintiff's compliance with the ACO and the cleanup on Lot 19.01. The DEP ordered plaintiff to submit a revised workplan and to establish a funding source for remediation. In an April 27, 2001 letter, the DEP issued a thirteen-point list of "instances whereby plaintiff failed to take timely and appropriate investigative and/or remedial action." The DEP also sent a notice to plaintiff identifying its failure to identify a funding source for remediation of the discharged contamination of Lot 19.01.

In June 2003, plaintiff requested the DEP stay the enforcement of the ACO pending resolution of its technical dispute with Exxon regarding respective responsibility for remediation efforts. Plaintiff maintained ninety percent of the contamination on Lot 19.01 may have resulted from the leakage of Exxon's UST beginning in "the early 1970s to 1980s," which "migrated radially" and impacted plaintiff's "upgradient location." The DEP declined to stay plaintiff's compliance with the ACO and suggested the assessment of respective responsibilities between it and Exxon regarding Lot 11 was a matter "best addressed in negotiation with ExxonMobil or before the Court." Further, the DEP discussed several factual discrepancies between its findings and data versus plaintiff's assertions and expert's opinion. The DEP reaffirmed its 1989 determinations that verified the release and migration of contamination from Lot 19.01, the cleanup responsibility for which rested solely with plaintiff. The DEP additionally noted LRP purchased the contaminated downgradient Lot 11 and, therefore, was "a party in any way responsible for contamination" at that site under the Spill Act. The DEP acknowledged Exxon held cleanup responsibility for Lot 11. Finally, the DEP advised plaintiff that if it desired a meeting with the Technical Review Panel, it must take steps "to elevate

the Technical Dispute to Step 2 of the Technical Review Process." The record does not reflect plaintiff took any further action in this regard.

On May 9, 2003, plaintiff's continued failure to obey the DEP's directives for remediation of Lot 19.01 resulted in the issuance of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA). Plaintiff appealed and the matter was certified as a contested case and transferred to the Office of Administrative Law (OAL). On November 1, 2006, following an evidentiary hearing, the ALJ issued an Initial Decision, rejecting plaintiff's attempt to repudiate its agreement to the ACO and ordering plaintiff: (1) "to establish and maintain the remediation funding source and to provide [the] DEP [with] satisfactory documentation that the requirement has been met"; (2) "to conduct remedial investigation relative to Lot 19.01 consistent with the [initial decision] and to submit all the information previously requested by [the] DEP's letters . . . and the [Notice of Violation] dated October 1, 2002"; and (3) "to pay $75,000 in civil administrative penalties for the above-described violations."

The Commissioner adopted the ALJ's findings and conclusions. Plaintiff appealed. In an unpublished opinion, we affirmed the agency determination. N.J. Dep't. of Envir. Prot.

v. Magic Petroleum Corp., Nos. A-1641-06 and A-2910-06 (App. Div. January 7, 2009) (slip op. at 4-5). The Supreme Court denied certification on March 23, 2009. N.J. Dep't. of Envir. Prot. v. Magic Petroleum Corp., 198 N.J. 473 (2003).

Thereafter, plaintiff filed this action against Exxon and other defendants[2] seeking an allocation of responsibility for costs expended and damages relating to the cleanup of the hazardous substances on Lot 19.01 as allowed under the Spill Act. Plaintiff's complaint also sought contribution under the Joint Tortfeasors' Act, N.J.S.A. 2A:53A-1, negligence, nuisance, trespass and tortious interference with plaintiff's business advantage.[3] Exxon counterclaimed, alleging the leaking UST on Lot 19.01 contributed to contamination at Lot 11.

Thereafter, Exxon filed a third-party Spill Act complaint against LRP, alleging the DEP required LRP to close the UST

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[2] Plaintiff's complaint names additional defendants who leased and operated a gasoline service station on Lot 11 or were predecessors in title. Only Tirico participates in this appeal, as she filed a notice seeking to join in and rely upon Exxon's position on appeal.

[3] As a condition of the sale to Tirico, Exxon was obligated to remove the USTs and perform any necessary remediation discovered during the UST removal on Lot 11, which included some remediation of surrounding soil areas. Plaintiff alleges Exxon performed the work improperly to its detriment. Currently, there is no activity at Lot 11 except for remediation action and investigation.

system on Lot 11 in 2005 as a result of the discharge of hazardous substances. Further, Exxon asserts plaintiff was identified by the DEP as a source of contaminants and, along with LRP, as a responsible party for the contamination on Lot 11. Extensive discovery was conducted, including the exchange of expert reports; however, a trial date had not been set.

Simultaneous with the pursuit of the Superior Court action, plaintiff continued to disagree with the DEP regarding the adequacy of plaintiff's remediation and investigation efforts in compliance with the AONOCAPA. On March 30, 2009, the DEP notified plaintiff it desired to perform remedial tests and activities on Lot 19.01. Plaintiff denied the DEP's access while the parties unsuccessfully attempted to negotiate an access agreement. In October 2009, the DEP filed a complaint and order to show cause to compel plaintiff to allow it access to Lot 19.01 to permit it to remediate the discharge of hazardous pollutants on the property, pursuant to N.J.S.A. 13:1D-1 to -19, and various other pollution control statutes. The court action was withdrawn without prejudice once the DEP and plaintiff consented to an access agreement allowing the DEP to enter Lot 19.01 for remedial investigation only. No agreement has been reached between the DEP and plaintiff

regarding the extent, nature, and type of necessary remediation activities and investigation.

Exxon moved to stay the litigation or dismiss plaintiff's complaint without prejudice, pending the DEP's latest investigation and remediation efforts. Exxon, citing the doctrine of primary jurisdiction, argued the DEP's efforts must precede any court determination under the Spill Act.

On August 27, 2010, the trial court considered that the DEP initiated the court action to perform a remediation investigation on Lot 19.01 and to order the type and extent of remediation. Because the DEP's investigative information would aid the determination of the present action for damages, the trial judge dismissed the complaint, counterclaim and cross-claim without prejudice, deferring to the DEP's primary jurisdiction over those issues:

> DEP is getting into this, ultimately it relates to damages. DEP is on [Lot 19.01], collecting information. That relates ultimately to what remediation will be ordered. And that in turn relates to what damages may be between the parties, or among them . . . . I'm granting the motion. . . . That's what they did in Forsgate.[4] That's what I'm doing here.

[4] The reference is to our unreported opinion Forsgate Indus. Complex, L.P. v. Leggett & Platt, Inc., No. A-1307-06 (App. Div. Oct. 11, 2007).

Plaintiff requested reconsideration, which was denied by an order filed on October 15, 2010. This appeal ensued.

In our review, we owe no special deference to the Law Division judge's determination of the legal question presented and we are not constrained to abide "'[a] trial court's interpretation of the law and the legal consequences that flow from established facts[.]'" Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 541 (App. Div. 2011) (quoting Manalapan Realty v. Tp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). See also Lombardo v. Hoag, 269 N.J. Super. 36, 47 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

On appeal, plaintiff maintains any action by the DEP is not relevant to its legal entitlements under the Spill Act and suggests the trial court improperly deferred to the DEP and misapplied the principles of primary jurisdiction. Before discussing this argument, we review the principles governing the doctrine of primary jurisdiction and the relief sought by the parties under the Spill Act.

"'Under the doctrine of primary jurisdiction, when enforcement of a claim requires resolution of an issue within the special competence of an administrative agency, a court may defer to a decision of that agency.'" Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 425 (App. Div.

2002) (quoting Campione v. Adamar of N.J., Inc., 155 N.J. 245, 263 (1998)). In this way, "'[t]he doctrine of primary jurisdiction, like that requiring exhaustion of administrative remedies, promotes proper relationships between courts and regulatory agencies.'" Ibid.

"Primary jurisdiction is defined as the circumstance in which a 'court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" Muise v. GPU, Inc., 332 N.J. Super. 140, 158 (App. Div. 2000) (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 269 n. 1 (1978)). "'[T]he case is properly before the court, but agency expertise is required to resolve the questions presented[.]'" Id. at 159. (quoting Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 83-84 (App. Div. 1999)). "[I]n order to avoid piecemeal adjudication or duplicative, anomalous or contradictory results," a court defers its exercise of jurisdiction "even if only temporarily, while the administrative agency with the primary interest sorts out the issues and the claims." Archway, supra, 352 N.J. Super. at 425. Consequently, the benefit of agency expertise is preferred in the first instance.

> The general test for when a court should defer to an agency's primary jurisdiction

> is: deference is appropriate only if "to deny the agency's power to resolve the issues in question" would be inconsistent with the "statutory scheme" which vested the agency "with the authority to regulate [the] industry or activity" it oversees.
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> [Muise, supra, 332 N.J. Super. at 160 (quoting United States ex rel. Haskins v. Omega Inst., Inc., 11 F. Supp. 2d 555, 561 (D.N.J. 1998)).

In Boldt, supra, we discerned four bases to review when determining whether to invoke the doctrine, including:

> 1) whether the matter at issue is within the conventional experience of judges; 2) whether the matter is peculiarly within the agency's discretion, or requires agency expertise; 3) whether inconsistent rulings might pose the danger of disrupting the statutory scheme; and 4) whether prior application has been made to the agency.
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> [320 N.J. Super. at 85.]

See also Muise, supra, 332 N.J. Super. at 160.

In considering the parties' respective requests for contribution under the Spill Act, we review the principles and policies undergirding that legislation. The Spill Act was enacted to "prohibit[] the discharge of petroleum and other hazardous substances into New Jersey waters and provide [] for the cleanup of any such discharge . . . ." Buonviaggio v. Hillsborough Twp. Comm., 122 N.J. 5, 8 (1991) (internal quotations omitted). To accomplish that goal, "[t]he Spill Act, imposes strict liability, 'jointly and severally, without regard

to fault,' upon 'any person who has discharged, . . . or is in any way responsible' for the discharge of any hazardous substance." Hous. Auth. v. Suydam Investors, L.L.C., 177 N.J. 2, 18 (2003) (quoting N.J.S.A. 58:10-23.11g(c)(1)).

> The Legislature declared its purpose was to provide liability for damage sustained within this State as a result of any discharge of said substances, . . . and to provide a fund for swift and adequate compensation to [] businesses and other persons damaged by such discharges, and to provide for the defense and indemnification of certain persons under contract with the State for claims or actions resulting from the provision of services or work to mitigate or clean up a release or discharge of hazardous substances.
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> [Dimant, supra, 418 N.J. Super. at 544-45 (citing N.J.S.A. 58:10-23.11a)].

See also Dep't of Envtl. Prot. v. Exxon Mobil Corp., 393 N.J. Super. 388, 391 (App. Div. 2007) (holding that "an entity may be strictly liable under [the Spill Act] for damages for the loss of natural resources adversely affected by its discharge of hazardous substances").

In addition to the authority granted to the DEP to direct or undertake the cleanup of hazardous spills, the Spill Act additionally allows a private cause of action to recover cleanup costs against "persons in any way responsible" for the pollution. N.J.S.A. 58:10-23.11(f)(a)(3); Bahrle v. Exxon Corp., 279 N.J. Super. 5, 36 (App. Div. 1995). The contribution

provisions were enacted "to provide a right of contribution to 'accomplish a fair and equitable . . . sharing of the remediation burden among all responsible parties.'" Cyktor v. Aspen Manor Condo. Ass'n, 359 N.J. Super. 459, 476 (App. Div. 2003) (quoting Pitney Bowes, Inc. v. Baker Indus., Inc., 277 N.J. Super. 484, 487 (App. Div. 1994)). To that end, the Spill Act provides

> [w]henever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution, [] plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to the provisions of [N.J.S.A. 58:10-23.11g] . . . .
>
> [N.J.S.A. 58:10-23.11f(a)(2)(a).]

Courts interpreting the phrase "in any way responsible" have emphasized that the statute, as remedial legislation, must be construed liberally so as to encompass even those parties remotely contributing to the contamination. Marsh v. Dep't of Envtl. Prot., 152 N.J. 137, 146-47 (1997); In re Kimber Petroleum Corp., 110 N.J. 69, 85, appeal dismissed, 488 U.S. 935, 109 S. Ct. 358, 102 L. Ed. 2d 349 (1988); Dep't of Envtl.

Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983). See also New Jersey Tpk. Auth. v. PPG Indus., Inc., 197 F.3d 96, 106 (3d Cir. 1999) (stating a party seeking contribution pursuant to the Spill Act must show some nexus between the contribution defendant and the site in question). Further, regulatory provisions enacted by the DEP have "defined 'person responsible for a discharge' to include, among others, '[e]ach owner or operator of any facility, vehicle or vessel from which a discharge has occurred.'" Marsh, supra, 152 N.J. at 147 (quoting N.J.A.C. 7:1E-1.6).

In this matter, while we agree that the court, not the DEP, has sole jurisdiction to allocate the costs of remediation among liable parties, GEI Int'l. Corp. v. St. Paul Fire and Marine Ins. Co., 287 N.J. Super. 385, 393 (App. Div. 1996), aff'd on other grounds, 149 N.J. 278 (1997), we reject the assertion that this is the only issue for adjudication. First, there has been no adjudication of whether Exxon is a discharger of the petroleum hydrocarbons in and around the soil and ground of Lot 19.01. Admittedly, while it owned Lot 11, Exxon was responsible for the removal of hazardous discharge on that property. However, plaintiff's theory that Lot 11's contamination migrated upgradient to pollute Lot 19.01 remains untested.

The determination of whether a party is a responsible person could be decided by the DEP. See N.J.S.A. 58:10-23.11g(c)(1) (stating any responsible person is strictly liable for all cleanup and removal costs incurred by the DEP); Marsh, supra, 152 N.J. at 145. So, too, we are aware of no preclusion barring the court's determination of that issue, leading us to conclude the Superior Court and the DEP have concurrent jurisdiction. Metex Corp. v. Federal Ins. Co., 290 N.J. Super. 95, 113 (App. Div. 1996).

In fact, a court determination of whether a party is a discharger may be most appropriate in a case where the DEP has identified a responsible party from whom it seeks investigation and cleanup, without regard to whether another party may be jointly responsible. Here, plaintiff believes this is such a case as the DEP has ordered it to complete the remediation of Lot 19.01 without considering whether Exxon or the other named defendants also must share the liability. Therefore, before consideration of any request for allocation of the costs of cleanup can be made, there must be an adjudication of whether Exxon and LRP also have liability for any part of the discharge on Lot 19.01.

If this were the only question before the trial judge, the question of primary jurisdiction may have been viewed

differently. However, there exists a more fundamental determination, which rests solely with the DEP. Prior to adjudicating the possible liability of the parties, the scope and nature of that liability must be determined. Stated differently, only the DEP can define the contaminants, determine the extent of the discharge, identify the authorized forms of investigative testing, and the permissive methodology of cleanup. Id. at 115. Moreover, prior to seeking reimbursement and contribution under the Spill Act, a party must obtain written approval from the DEP of the investigation and proposed remedial action. Ibid. See also Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 867 (D.N.J. 2003) (concluding "that such costs were approved by and/or incurred at the direction of [the] DEP and thus are recoverable under the Spill Act").

Here, in applying the test set forth in Boldt, supra, 320 N.J. Super. at 85, we note plaintiff has not obtained the DEP's approval for the remediation or the costs of same. These issues rest within the DEP's special expertise, not that of the court. Moreover, until the DEP agrees the investigation properly identifies the scope of the cleanup and approves the methodology for proper remediation, the court cannot properly determine contribution. Were this effort undertaken first,

inconsistent rulings may conflict with the agency's responsibility to protect the State's natural resources from hazardous contamination. We need not interfere with the trial judge's application of primary jurisdiction to allow the DEP to pursue its ongoing remedial investigation defining the scope of necessary cleanup, which will better inform the cost of remediation.

Because we have not adopted the trial court's reasoning as the basis of our decision, we do not need to discuss in detail plaintiff's additional argument that that the trial court improperly relied on unpublished authority. The proscription set forth in Rule 1:36-3[5] does not preclude a trial court's adoption of an unpublished opinion's analysis as persuasive. See Nat'l Union Fire Ins. Co. of Pittsburgh v. Jeffers, 381 N.J. Super. 13, 18-19 (App. Div. 2005). Here, any error in reliance on the unpublished opinion was harmless. R. 2:10-3.

Affirmed.

[5] Rule 1:36-3 states in pertinent part:

> No unpublished opinion shall constitute precedent or be binding upon any court . . . . No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.