

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1561-09T2

HSJ PROPERTIES, L.L.C., a Kansas
Limited Liability Company,

Plaintiff-Appellant,

v.

SECRET GARDEN LANDSCAPING and
FIRST CLASS CONSTRUCTION, INC.,

Defendants,

and

LEO HAGERTY and
JERSEY CONSTRUCTION, INC.,

Defendants-Respondents.

Submitted November 9, 2010 - Decided March 29, 2011

Before Judges Payne, Baxter and Koblitz.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Docket No.
L-5411-05.

Riker Danzig Scherer Hyland & Perretti,
L.L.P., attorneys for appellant (Michael K.
Furey, of counsel; Mr. Furey, Daniel W.
Zappo and Stephanie R. Wolfe, on the
briefs).

Law Office of Victor Druziako, P.C.,
attorney for respondent Leo Hagerty (Mr.
Druziako, on the brief).

Law Offices of Michael J. Dunn, L.L.C.,
attorneys for respondent Jersey
Construction, Inc. (Frank P. Menaquale,
Jr., on the brief).

PER CURIAM

Plaintiff HSJ Properties, L.L.C., a commercial developer, appeals from the directed verdict entered on its claims against defendants Leo Hagerty and Jersey Construction, Inc. at the close of HSJ's presentation of evidence in a suit claiming negligence and breach of contract by defendants. Determining that the standards set forth for involuntary dismissal by Rule 4:37-2(b) were not met, we reverse and remand the matter for retrial.

I.

In or around 2002, HSJ determined to develop land located in Cherry Hill, New Jersey for use as a storage facility comprised of twenty-three storage buildings and an office building. The land that it proposed to use as the site sloped downward at the rear, and thus leveling it by adding fill and constructing three retaining walls was required, as well as other site improvements.

In furtherance of its planned development, HSJ contracted with Vollmer Associates L.L.P. to provide construction plans for the project. Detail drawings for the construction designated C-0 through C-8 were dated and stamped August 29, 2002; plans and specifications designated P-1 through P-9 were dated and stamped April 25, 2003. P-2, entitled "Construction Specifications," contained specifications for the three retaining walls to be constructed at the site. The specifications required that the wall units comprising the wall be "Allan Block Modular Retaining Wall units, or approved equivalent as produced by a licensed Manufacturer." Specifications were also given for gravel aggregate to be utilized at the site and for backfill material.

P-2 also detailed the method of wall construction, specifying that the wall be built, level, on a base of at least six inches of aggregate, with the raised lip of the block facing forward to facilitate a gradual step-back in the placement of succeeding levels of block. All cavities were to be filled with aggregate and compacted. A designated number of courses of block were to be installed below grade.

Following the construction of additional unit levels, "geogrid," a fabric comprised of high density polyethylene or polyester was to be installed between the blocks and extended

into the surrounding compacted backfill in order to anchor the wall. Thereafter, as wall construction progressed, backfilling was to occur in lifts of a specified height, the soil material was to be compacted, and additional courses of geogrid were to be installed. Testing of the soil used for backfill was required in order to insure that it met specifications. The plan specified that "one foot thick minimum of drainage aggregate" be placed immediately behind the wall for drainage purposes. Additionally, a four-inch perforated drainage collection pipe was to be installed at the base of each wall, and outlet pipes were to be inserted in the wall with a forty-foot maximum spacing.

The plan designated as P-2 also contained a section labeled "Product Options and Substitutions" that contained a paragraph concerning substitutions, which stated:

2. Substitution Submittal Procedure:
 - a. Submit shop drawings, product data, and engineering calculation attesting to the proposed product equivalence.
 - b. Submit a statement setting forth changes in other products or other portions of the work including changes in the work or other separate contractors, where applicable, that incorporation of the proposed substitution would require.

- c. The owner will notify the contractor, in writing of decision to accept or reject request.

A detailed drawing of the wall and its components was also supplied that pictured the six-inch aggregate base, the stepped-back blocks, the perforated drainage pipe, the layer of aggregate behind the wall, the geogrid, and the backfill. General Retaining Wall Notes provided, among other things, for soil compaction tests and specifications.

On March 15, 2003, HSJ entered into a subcontract with Leo Hagerty, Jr. for him to provide site supervision. Paragraph one of the agreement, addressing the scope of the work, provided:

The Subcontractor agrees to furnish all tools, equipment, and labor necessary to complete the following: As per approved plan and design and attached Addendum A.

. . . .

All work shall be completed as per approved plans and specifications and in a good and workmanlike manner to the satisfaction of the Owner.

Addendum A provided that the Superintendent was responsible for "[s]upervising all subcontractors and assuring that they perform their work with quality and in a professional and timely manner." The contract also contained a paragraph, captioned "Changes," which required that "no extras or changes shall be performed without written notice from the Owner."

A contract was also entered with defendant Secret Garden Landscaping to "Supply and Install Landscaping; construct Retaining Wall per the following drawings prepared by Vollmer Associates, LLP: (1) C-0 through C-8; all of which are dated and stamped as of 8/29/02 and (2) Construction Drawings for Retaining Wall System, sheets P1-P9 dated 4/25/03."

Additionally, defendant Jersey Construction, Inc. was retained as a subcontractor to "Construct Site Improvements per the following drawings prepared by Vollmer Associates, LLP:

. . . C0, C1, C2, C3, C4, C5, C6, C7 and C8 – all of which are dated and stamped as of 8/29/02." Excluded from the work were: "Concrete pads between storage buildings, fencing, interlocking retaining wall, landscaping, erosion matting, site lighting."

HSJ's representative, Jay Wagon, testified that Jersey Construction was supposed to do "[a]ll of the site work . . . all the soil work, stone, asphalt, curbs, everything related to . . . the site." Particularly, that entity was to provide:

first the demolition of the site, bring everything up to grade, do all of the dirt work, all of the stone work. There was stone, not only on the inside of the retaining wall, but on the outside of the retaining wall [as] . . . part and parcel with the drainage system . . . all of the detention basins, the drainage systems that went to the detention basins, the interface between that system and the roof drains . . . all of the asphalt, basically everything

on those drawings except what it says here
[in the contract's exceptions].

Construction of the retaining wall commenced in June 2003; construction at the site was completed on April 7, 2004. Shortly after the facility opened, Wagon observed problems with the three retaining walls. "[W]hat should [have been] a straight line and a fairly, kind of, straight structure was bulged in several areas. It was very irregular. It looked like pieces of it were about to topple over." Additionally, the ten-foot space between the walls and the buildings was very wet, and large voids commenced to appear in the dirt. Wagon took pictures of the damage, sending copies to the manufacturer of Allan Block and stating "you've got a problem with your wall," only to be informed that Allan Block had not been used at the site.

HSJ then retained R.V. Buric Architecture, Engineering, & Planning, LLC to install emergency shoring and to diagnose the problems at the facility. Buric employee and forensic architect, Mark Berman, rendered an expert report in January, 2005. In that report, he found first that, although Allan Block materials had been specified, they had not been used as required by contract documents and that HSJ had not been informed of the substitution.

Next, Berman found defects in the wall construction and backfill. He determined that the base course had not been installed in a level fashion. He found improper installation of the base material, which was measured at a two-inch depth, not the six inches that the plans specified. Although the construction documents specified twelve inches of aggregate behind the wall for drainage purposes, in some areas, no drainage material was found. Additionally, crushed stone was not placed in block cavities, as required.

Berman found, third, that improper installation of the geogrid reinforcement, which was found to be missing in various areas, had contributed to the structural instability of the walls. Fourth, he found that failure to properly install wall drainage had resulted in an increase in the hydrostatic pressure on the retaining walls. Additionally, he found that hydrostatic pressure was forcing water through the storage building foundations and created conditions detrimental to the supporting foundation soils.

Pictures taken in the course of Berman's investigations disclosed wall areas in which no through drainage had been provided, extensive areas of soil settlement, the absence of aggregate backfill abutting the wall, bulging of the wall and areas of failure, missing building gutters, a substantial crack

in a concrete slab as the result of soil settlement, problems with the drainage from downspouts and connections to flexible pipes, flooding in the area of building foundations, the presence of improper clay soil, soil saturation, improper stepping and leveling of the wall units, the absence of fill in block cavities, the absence of geogrid, the absence of a perforated drainage pipe at the base of a wall, and inadequate depth to the base layer of aggregate.

In his report and subsequent deposition, Berman attributed all of the construction defects to the work of Secret Garden Landscaping. In that regard, counsel for Jersey Construction stated to Berman at his deposition "you have not made an opinion regarding Jersey Construction regarding this retaining wall; is that correct?" Berman responded: "That is correct."

Additionally, Berman testified that he was unaware of Hagerty's involvement in the project prior to writing his report, and he offered no opinions with respect to the quality of his work.

Remediation was performed by the Collin Group, which placed post-tensioning devices in the wall and backfill to provide stability.

On June 22, 2005, HSJ filed suit against Secret Garden, Hagerty, First Class Construction, Inc.,¹ and Jersey Construction claiming breach of contract, negligence, consumer fraud and fraud. Following twelve adjournments, the case, reduced to HSJ's claims of breach of contract and negligence, was scheduled for a bench trial on October 14, 2009. On the preceding day, HSJ reached a settlement with Secret Garden, and a consent judgment was entered against it in the amount of \$550,000. However, whether the judgment could be satisfied remained in doubt, as Secret Garden was in bankruptcy and its insurer contested coverage.

At the commencement of proceedings on October 14, counsel for Jersey Construction informed the trial judge that HSJ's expert, Berman, wished to amend his report to assert claims against Jersey Construction. Counsel stated:

This morning, when I asked [plaintiff's counsel] why Mr. Berman was testifying, because I thought he was testifying against [Hagerty], but in reading the deposition, he had no opinion against [Hagerty] either. He was only hired to look at the retaining wall. That's what his report says.

And now they're trying to go into issues which will severely prejudice my client, since this is the first we're

¹ The record does not reflect its appearance in this matter. It was alleged in the complaint to have constructed twenty-four building foundations.

learning of it and we have no way to defend against it. There's no discovery that we can do because if you don't know something, you can't defend against it.

In response, counsel for HSJ admitted that Berman had not implicated Jersey Construction in his report. However, he argued that Berman's factual findings and conclusions nonetheless pointed to that defendant's liability in a fashion that defendant could not have ignored. Consequently, an amendment of the report to name Jersey Construction as a culpable party would come as no surprise. When asked specifically to describe Berman's proposed testimony, HSJ's counsel stated that he would discuss Jersey Construction's improper installation of drainage and the improper selection of soil and installation of backfill.

Following a brief adjournment to permit counsel for HSJ to marshal his evidence, the judge ruled that "[t]here is absolutely nothing in the record by way of expert report or deposition testimony which would, in any way, support this expert's testimony as proposed concerning . . . Jersey Construction." Finding that, in this case, there had been more than ample time for Berman to amend his report, but that he had failed to do so, the judge ruled: "[T]his trial has started and there's absolutely nothing that would permit this expert to testify in . . . accordance with what the plaintiff's counsel's

represented; therefore the testimony is barred." The bar was applied in connection with both remaining defendants. However, the judge permitted Berman to testify as a fact witness.

Testimony was then offered for HSJ by Wagnon, Berman, and the person providing remediation, James Collin. Additionally, excerpts from the deposition of Secret Garden's principal, Brent Stephens, and from the deposition of Hagerty were read into the record. At the close of plaintiff's evidence, defendants moved for a directed verdict in their favor pursuant to Rule 4:37-2(b). The judge granted the motions, ruling that, without expert testimony, she could not determine whether alleged fault on the part of Hagerty and Jersey Construction was a proximate cause of the wall's failure and HSJ's damages. As a consequence, the judge dismissed both HSJ's negligence claim and its "intertwined" claim for breach of contract.

This appeal followed.

II.

HSJ first argues that the trial judge abused her discretion when she barred Berman from giving opinions regarding the conduct of Hagerty and Jersey Construction. It claims that defendants received fair notice from the substance of Berman's report, and that neither would have been unfairly prejudiced if Berman had been permitted to ascribe fault as proposed.

Further, HSJ claims that the judge abused her discretion in imposing the harshest possible sanction without exploring other alternatives.

We do not accept HSJ's position. We have held:

Expert testimony that deviates from the pretrial expert report may be excluded if the court finds "the presence of surprise and prejudice to the objecting party." Velazquez ex rel. Velazquez v. Portadin, 321 N.J. Super. 558, 576 (App. Div. 1999), rev'd on other grounds, 163 N.J. 677 (2000). In New Jersey, "[i]t is well settled that a trial judge has the discretion to preclude expert testimony on a subject not covered in the written reports furnished in discovery." Ratner v. General Motors Corp., 241 N.J. Super. 197, 202 (App. Div. 1990). As a result, an abuse of discretion standard of review is utilized in appellate oversight of a trial judge's decision to allow or to exclude such testimony. Velazquez, supra, 321 N.J. Super. at 576.

[Conrad v. Robbi, 341 N.J. Super. 424, 440-41 (App. Div.), certif. denied, 170 N.J. 210 (2001).]

When exercising discretion in this context, a trial judge should consider whether there was a design to mislead, whether the affected defendant would be surprised if the evidence were admitted, and whether the defendant can demonstrate prejudice as the result of the admission of the evidence. Id. at 441.

In the present case, the judge found no design to mislead on the part of counsel to HSJ, and that conclusion finds support in the record. Our focus is thus on the two remaining factors:

surprise and prejudice. With respect to surprise, HSJ argues: "A party cannot claim to be surprised by expert testimony, when it contains 'the logical predicates for the conclusions from statements made in the report.'" Ibid. (quoting Velazquez, supra, 321 N.J. Super. at 576). However, neither Velazquez nor Conrad addressed the issue that is present here: whether an expert can, on the day of trial, abandon his exclusive focus on a defendant who has reached a settlement with the plaintiff and, for the first time, find fault on the part of other persons and entities. We find no abuse of discretion on the part of the trial judge who concluded that the expert could not do so. While it is true that the factual predicates for such opinions may have been present in Berman's report as the result of his detailing of the defects in workmanship found at the site, defendants, lacking expert rebuttal, would undoubtedly be severely prejudiced if he were to testify as he newly proposed.

In this regard, we note that, despite Berman's knowledge of the participation of Hagerty and Jersey Construction in the work at the site and his knowledge of the scope of their duties as the result of his review of their contracts with HSJ, Berman did not find fault with either defendant in his 2005 report, in his 2007 deposition, or thereafter. In these circumstances, defendants, not unreasonably, did not retain experts to counter

Berman's unexpressed conclusions regarding fault. We are aware of no decision that would permit Berman's testimony against Hagerty and Jersey Construction in such circumstances.

As a final matter, we find no abuse of discretion in the judge's determination to proceed with the trial that had commenced that morning before her. The case was more than four years old, and as we have previously noted, twelve adjournments of trial had been granted. Further, HSJ was on notice of the limits of Berman's opinions as the result of his 2005 report and his examination by counsel for Hagerty and Jersey Construction at his 2007 deposition. It had been afforded an ample opportunity to request that Berman expand his conclusions, render a revised report, and to seek its acceptance. That it failed to do so does not compel the conclusion that trial should again have been adjourned. Compare Ratner, supra, 241 N.J. Super. at 202-03 (when only objective evidence in support of plaintiff's theory of liability was newly discovered, trial should have been adjourned or a mistrial declared to give defendants an opportunity to refute plaintiff's expert's testimony regarding the evidence).

III.

We do agree, however, with HSJ's argument that the trial court erred in granting a directed verdict in favor of Hagerty

and Jersey Construction at the conclusion of plaintiff's proofs on liability. Rule 4:37-2(b) provides:

After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

Our review of the record satisfies us that, when the standard that we have quoted is applied to the evidence adduced by HSJ, that evidence was sufficient to sustain a verdict in its favor and against both Hagerty and Jersey Construction for negligence and breach of contract.

With respect to Hagerty, HSJ established through introduction of his contract that, as site supervisor, he was to insure that that "[a]ll work [was] completed as per approved plans and specifications and in a good and workmanlike manner to the satisfaction of the Owner." However, the factual findings contained in Berman's report, which was introduced into evidence, set forth numerous examples of work performed under Hagerty's supervision that was not completed in the manner that

the contract specified, including the installation of the base aggregate layer below the wall, the construction of a level wall, the placement of aggregate behind the wall and in the crevices within the block, soil testing, soil tamping, installation of drainage, and the placement of geogrid.

As Berman testified at trial, Vollmer's plans were almost "idiot proof." Yet, Hagerty failed to insure that they were followed. Indeed, Wagon testified that Hagerty was not on site on a third of the occasions when Wagon came to inspect and, when there, he appeared to be working on a personal project. Although the cause was contested, Wagon testified that dissatisfaction with Hagerty's supervision led him to terminate Haggerty prior to the completion of the project.

The contract between HSJ and Haggerty provided additionally that "no extras or changes shall be performed without written notice from the Owner." Vollmer's plans and specifications, also introduced into evidence, contained further, detailed procedures required to obtain approval of substitutions. Nonetheless, evidence suggests that Hagerty permitted use of a substitute for the Allan Block specified by Vollmer without consulting HSJ or complying with Vollmer's requirements. The Allan Block units had a raised front lip, which the substituted block did not, that insured that, as the wall was built up, its

surface would gradually and evenly recede backward. The use of the substitute block, Berman found, resulted in a wall surface that was uneven.

With respect to Jersey Construction, its contract with HSJ required it to complete site improvements shown on the C series of the Vollmer construction drawings, excluding construction of concrete pads between storage buildings, fencing, construction of the retaining wall, landscaping, erosion matting, and site lighting. In that regard, Jersey Construction covenanted "to furnish its best skill and judgment and to perform all services and construction in accordance with the highest professional standards to produce the timely, fit and proper completion of the work." According to Wagon, Jersey Construction's duties included

first the demolition of the site, bring[ing] everything up to grade, do[ing] all of the dirt work, all of the stone work. There was stone, not only on the inside of the retaining wall, but on the outside of the retaining wall [as] . . . part and parcel with the drainage system . . . all of the detention basins, the drainage systems that went to the detention basins, the interface between that system and the roof drains . . . to connect those, all of the asphalt, basically everything on those drawings except what it says [in the exceptions].

Wagon testified that, although Jersey Construction did not construct the retaining walls or lay the geogrid, it was

responsible for backfilling with stone and dirt directly behind the wall and compacting the newly placed dirt, as well as doing soil testing. Yet, when its work was completed, the area between the wall and the buildings was very wet, suggesting improper drainage and the use of improper soil, and large voids appeared in the dirt.

Further, when discussing his investigatory findings, Berman testified that the construction drawings called for clean fill without inclusions. However, he observed clay to be present. Clay is not pliable, does not compact, holds water, and is heavier than clean soil. Berman expressed the opinion that the presence of saturated soils contributed to the failure of the retaining wall. He similarly stated that the presence of sink holes was "consequential to the wall."

We do not find this evidence to be so esoteric as to require expert testimony for its significance to HSJ's claims of negligence and breach of contract to be recognized. Landrigan v. Celotex Corp. 127 N.J. 404, 413 (1992). When the evidence is viewed in a light most favorable to HSJ, its claims are clearly factually supported.

In granting a directed verdict, the trial judge found that she could not determine without expert testimony which portion of HSJ's damages resulted from the alleged fault of Hagerty and

Jersey Construction. However, in a case such as this, the burden of apportionment lay with defendants. O'Brien Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am., 361 N.J. Super. 264 (App. Div. 2003), certif. denied, 178 N.J. 452 (2004). In that case, we held that, when unitary property damage occurred to an innocent property owner, consisting of a massive fire in a cogeneration plant fueled by leaking oil, the defendants causing the injury are jointly and severally responsible unless they can apportion the harm. Id. at 277 (citing Goodman v. Fairlawn Garden Assocs., Inc., 253 N.J. Super. 299, 395 (App. Div.), certif. denied, 130 N.J. 7 (1992); Daniel v. State Dep't of Transp., 239 N.J. Super. 563, 595 (App. Div.), certif. denied, 122 N.J. 325 (1990)).

In this case, Wagon testified to damages of \$650,000 in connection with the wall, an additional \$20,000 to \$30,000 attributable to landscaping and counsel fees of \$107,495. While damages arising from problems with landscaping were clearly the responsibility of Secret Garden, the remaining damages arising from the improper construction of the wall constituted unitary property damage to which the apportionment principles expressed in O'Brien apply, HSJ being an innocent party. For this reason, the concerns expressed by the trial judge regarding damage apportionment were misdirected.

As a consequence of the foregoing, we reverse the judgments entered in favor of Hagerty and Jersey Construction and remand this matter for retrial.

Reversed and remanded.

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



CLERK OF THE APPELLATE DIVISION