SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0473-22

GETTY PROPERTIES CORP.,

Plaintiff-Appellant,

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, TRAVELERS CASUALTY AND SURETY COMPANY, BEDIVERE INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., ILLINOIS NATIONAL INSURANCE COMPANY, AIU INSURANCE COMPANY, COMMERCE AND INDUSTRY INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, AIG SPECIALTY INSURANCE COMPANY, and AMERICAN HOME ASSURANCE COMPANY,

Defendants-Respondents.

Argued May 29, 2024 – Decided June 27, 2024

Before Judges Rose and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0006-19.

Dominic I. Rupprecht (Reed Smith LLP) of the Pennsylvania bar, admitted pro hac vice, argued the cause for appellant (Reed Smith, LLP, and Dominic I. Rupprecht, Anthony B. Crawford (Reed Smith, LLC), Jay M. Levin (Flaster Greenberg, PC), Traci S. Rea, of the Pennsylvania bar, admitted pro hac vice, attorneys; Jay M. Levin, Anthony B. Crawford, Dominic I. Rupprecht, and Traci S. Rea, on the briefs).

Cecilia Froelich Moss (Chaffetz Lindsey, LLP) of the New York bar, admitted pro hac vice, argued the cause for respondents National Union Fire Insurance Company of Pittsburg, PA, Commerce and Industry Insurance Company, AIU Insurance Company, AIG Specialty Insurance Company, Illinois National Insurance Company and American Home Assurance Company (Riker Danzig, LLP, Cecilia Froelich Moss, Charles J. Scibetta (Chaffetz Lindsey, LLP) of the New York bar, admitted pro hac vice, and Joshua D. Anders (Chaffetz Lindsey, LLP) of the New York bar, admitted pro hac vice, attorneys; Anthony J. Zarillo, Jr., of counsel and on the brief; Michael J. Rossignol, Jeffrey M. Beyer, Cecilia Froelich Moss, Charles J. Scibetta, and Joshua D. Anders, on the brief).

Daren S. McNally argued the cause for respondents St. Paul Fire and Marine Insurance Company, The Travelers Indemnity Company, Travelers Property Casualty Company of America, and Travelers Casualty

and Surety Company (Clyde & Co LLP, attorneys; Daren S. McNally, Meghan C. Goodwin, Barbara Almeida and Kurt Campanile, on the brief).

PER CURIAM

This insurance coverage dispute returns to us following a remand ordered in our previous opinion. Getty Props. Corp. v. St. Paul Fire & Marine Ins. Co., No. A-0182-19 (App. Div. Dec. 30, 2021). The crux of the dispute is two competing coverage actions filed in New York and this state several years after environmental agencies in Maryland, Pennsylvania, and New Jersey instituted lawsuits against plaintiff Getty Properties Corp. and numerous petroleum companies for remediation of groundwater contamination caused by a gasoline additive (collectively, the three remediation actions). Getty, in turn, sought defense and coverage from several insurers, including defendants National Union Fire Insurance Company of Pittsburg, Pa. (AIG), and St. Paul's Fire and Marine Insurance Company (Travelers) (collectively, insurers).[1]

[1] Travelers includes the Travelers Indemnity Company, Travelers Property Casualty Company of America, and Travelers Casualty and Surety Company. AIG includes the Commerce and Industry Insurance Company, AIU Insurance Company, AIG Specialty Insurance Company, Illinois National Insurance Company, and American Home Assurance Company. Getty settled its claims with Ace American Insurance Company, and as such, it is not a party to this appeal. See Getty Props., slip op. at 2 n.1.

In December 2018, Travelers filed a declaratory action against Getty in New York, the location of its principal place of business.[2] Travelers sought to resolve the coverage dispute regarding the policies at issue in the three remediation actions. The following month, Getty moved to dismiss or stay the underlying New York action and filed a complaint in the Law Division against Travelers, AIG, and other carriers, seeking to resolve the defense and coverage dispute as to the action filed by the New Jersey Department of Environmental Protection (DEP), only. In June 2019, the motion judge granted the insurers' separate motions to dismiss Getty's complaint under the rule of comity and the forum non conveniens doctrine.[3]

Getty appealed, asserting the motion judge failed to follow the comity analysis set forth by our Supreme Court in Sensient Colors Inc. v. Allstate, 193 N.J. 373, 386-87 (2008), and therefore erred by not finding special equities weighed in favor of the New Jersey action. Getty also argued the judge erroneously dismissed its action under the forum non conveniens doctrine.

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[2] At some point, AIG intervened in the New York action. See Getty Props., slip op. at 2.

[3] We glean from the record, in May 2019, the New York state court denied, under the first-filed rule, Getty's partial motion to dismiss or stay the declaratory judgment claims pertaining to the DEP's action in view of Getty's then pending action in the Law Division.

We acknowledged our discretionary standard of review of the judge's decision under both principles. Getty Props., slip op. at 10; see Sensient Colors, 193 N.J. at 390 ("The determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court."); Kurzke v. Nissan Motor Corp., 164 N.J. 159, 165 (2000) (recognizing decisions concerning the application of the forum non conveniens doctrine "are left to the sound discretion of the trial court"). However, we concluded our review was hampered, in large part, by the judge's failure to: "fully consider the special equities at stake" in this matter, Getty Props., slip op. at 11; and "conduct a full forum non conveniens analysis," id. at 29. Noting "a discretionary decision [is] entrusted to the trial court in the first instance," we explicitly declined to conduct either analysis. Id. at 11 (citing State v. Micelli, 215 N.J. 284, 293 (2013)). We therefore vacated the orders under review and directed that the judge conduct a fulsome review of both issues. Id. at 3.

On remand, after considering the parties' supplemental briefs and oral argument, the same judge issued a cogent decision from the bench, again dismissing Getty's complaint without prejudice.

Getty now appeals from the April 18, 2022 memorializing orders, made final by a September 23, 2022 order.[4] Asserting the motion judge abused his discretion by failing to follow our remand instructions, Getty seeks reversal of the dismissal orders and reinstatement of its New Jersey action. Having considered the judge's decision in view of our directive and the governing legal principles, we discern no basis to disturb the orders under review. We therefore affirm.

I. The Prior Appeal

The pertinent facts and procedural history are well-known to the parties, summarized in our prior opinion, id. at 3-8, and need not be repeated at length. We therefore provide only those facts pertinent to the issues presented on this appeal.

The insurers issued the relevant commercial general liability insurance policies to Getty or its corporate predecessor at its New York address, with the assistance of its New York broker. Id. at 3. The same policies are at issue in the New York and New Jersey actions.

[4] On August 31, 2022, the only remaining party, Bedivere Insurance Company, was dismissed from the litigation by stipulation. Accordingly, on September 23, the judge granted plaintiff's application to confirm the April 18, 2022 orders as final and appealable as of right.

Commencing in 2007, Getty and nearly fifty other petroleum companies were sued by the DEP for groundwater contamination emanating from the release of methyl tertiary butyl ether (MTBE), which was discharged from the companies' gasoline storage and delivery systems. Id. at 4. Thereafter, Getty and other petroleum companies were sued in Pennsylvania and Maryland for similar claims in those states. Ibid. As we noted in our prior opinion, the lawsuits filed by the DEP and Pennsylvania "were consolidated in federal multi-district litigation . . . in the Southern District of New York, but aspects of the DEP action were later remanded to the District of New Jersey. Maryland's lawsuit was removed to federal court in that state." Ibid.

Getty then sought defense and coverage from multiple insurers. Ibid. At some point, AIG agreed to defend but not provide coverage in the DEP action. See ibid. Getty did not request defense and coverage from Travelers under the three remediation actions until 2018. Id. at 4-5. The New York and New Jersey state court actions followed. See id. at 7. As noted, the motion judge dismissed the New Jersey action, finding the first-filed New York action was the most

appropriate forum. Id. at 8. We summarized the judge's oral decision in our prior opinion. Id. at 8-10.[5]

We also recounted "the framework for applying comity principles to lawsuits simultaneously pending in multiple jurisdictions." Id. at 12 (citing Sensient Colors, 193 N.J. at 386). Further, we restated the principles relevant to a forum non conveniens analysis, noting they are "substantively different from a comity analysis." Id. at 29-31 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)). We therefore need not reiterate the governing law.

II. The Present Appeal

We commence our review by defining the task at hand. We have long recognized when adjudicating a matter returning to the Appellate Division following a remand, our scope of review is limited. See Deverman v. Stevens Builders, Inc., 35 N.J. Super. 300, 302 (App. Div. 1955). "It is not our function . . . to allow a collateral review of the first decision of this Division but only to adjudge whether it has been complied with." Ibid.

"It is the peremptory duty of the trial court, on remand, to obey the mandate of the appellate tribunal precisely as it is written." Jersey City Redev.

[5] Although the parties did not provide the transcript of the judge's decision on appeal, they do not dispute our summary of his decision on remand.

Agency v. Mack Props. Co. No. 3, 280 N.J. Super. 553, 562 (App. Div. 1995); see also Tomaino v. Burman, 364 N.J. Super. 224, 232 (App. Div. 2003) ("It is beyond dispute that a trial judge has the responsibility to comply with pronouncements of an appellate court."). As such, "[a]lthough trial judges are privileged to disagree with our decisions, 'the privilege does not extend to non-compliance.'" Id. at 233 (quoting Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 415 (1961)).

A. Special Equities Analysis

At the outset of his decision, the judge addressed the first-filed rule under Sensient Colors, noting we did not disturb his initial decision that the insurers, as the moving parties, had established the existence of "an earlier filed action in another state and that the prior action involves substantially the same parties, claims and legal issues as the second filed action." See 193 N.J. at 391; see also Deverman, 35 N.J. Super. at 302 ("The ruling on the first appeal is the law of the case."). Accordingly, the judge found the burden shifted to Getty to "demonstrate the presence of one or more special equities that overcome the presumption favoring the first-filed action." See Sensient Colors, 193 N.J. at 391.

The judge elaborated:

> Special equities can be found under a variety of circumstances as stated in Sensient Colors, such as: when one party has engaged in jurisdiction shopping to deny the other party the benefit of its natural forum; a party has in bad faith filed first anticipating imminent suit in another less favorable forum; the second action implicates significant state interests, such as the remediation of polluted sites; and, deferring to the first action would contravene the public or judicial policy; or, finally, proceeding with the first-filed action would cause great hardship and inconvenience to a party in the first action and no unfairness to the opposing party in th[e] . . . second action.
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> [See 193 N.J. at 387-90.]

Turning to the special equities at issue here, the judge first addressed our concern that he "fail[ed] to identify and to weigh New Jersey's significant interest in remediating New Jersey contamination, including determining insurance for such claims." Getty Props., slip op. at 15. In particular, we rejected the insurers' argument that multistate pollution "relieve[d] the trial court of considering New Jersey's strong interest in remediating pollution, which extends to securing appropriate insurance coverage to those responsible for remediation." Id. at 16-17 (citing American Home Products v. Adriatic Ins. Co., 286 N.J. Super. 24 (App. Div. 1995)).

Expressly "acknowledg[ing] the importance of this factor" on remand, the judge, however, was not persuaded "the existence of pollution in New Jersey

automatically justifies a finding that special equities exist to disregard the rule of comity." Thus, the judge rejected Getty's argument that "this factor alone warrants a refusal to adopt the rule of comity." The judge weighed our state's interests by distinguishing the facts in Sentient Colors from those presented here:

> The property damage in . . . Sensient Colors involved a single New Jersey site, entirely within New Jersey's borders, contaminated by a single entity with a long-standing business in New Jersey. The parties in Sensient [Colors] had little connection to New York and the insured was headquartered in Missouri, and the Court noted that not just property but health and safety were at issue since it concerned contamination of a residential site with children and dangerous levels of lead.
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> [See 193 N.J. at 379-83.]

Conversely, the judge found: "Here, the MTBE contamination is located at thousands of sites in three separate states and is not . . . limited in New Jersey to a single site." Additionally, the judge noted unlike Sensient Colors, there was no concern about "the ultimate remediation of the site" in view of "the earlier settlements with DEP." Nor was there evidence in that case of "a first strike maneuver by the insurers."

The judge also distinguished the facts in American Home Products, where "the insured had its worldwide headquarters in New Jersey, employed thousands

of individuals, approximately a third of the total estimated site remediation damagers were in . . . New Jersey, and the New Jersey action had been pending for about two years prior to the motion." See 286 N.J. Super. at 39-40. Here, Getty has its principal place of business in New York and lacks similar connections to this state.

Next, the judge addressed our instruction to consider, as a special equity, the divergent public policies between New York and New Jersey vis-à-vis environmental insurance coverage. Getty Props., slip op. at 21. Specifically, we directed the judge to consider the pollution exclusion and late notice clauses at issue. Id. at 21-22. We stated: "As a matter of public policy, New Jersey will not enforce the standard pollution exclusion clause unless 'the insured intentionally discharged, dispersed, released, or caused the escape of a known pollutant.'" Id. at 22 (quoting Sensient Colors, 193 N.J at 395). Conversely, in view of New York's historical, although repealed, requirement to include pollution exclusion clauses in insurance contracts, "a New York court would likely enforce such a provision on public policy grounds." Ibid.

Paraphrasing the Supreme Court's holding in Sensient Colors, the motion judge acknowledged "New Jersey's interest in a case can become more compelling because of the [divergent public] policy approaches taken where the

heart of the case depends on which state's substantive law applies, and we are certain that a New Jersey court will apply the laws of New Jersey." See 193 N.J. at 395. Recognizing the New York court had granted summary judgment in favor of the insurers, and the decision was under appellate review, the motion judge determined Getty "may be collaterally estopped from relitigating [the] issue."[6] Thus, the judge concluded it was uncertain whether New Jersey law would apply if the action remained in the Law Division.

The judge further found there was no evidence in the record that "New York public policy is against coverage for . . . remediation." Further, regardless of which state's law applies, "all but two of the Travelers' policies . . . contain total pollution exclusions," and all but one of the thirty-five AIG policies contain "pollution exclusions or endorsements that do not implicate any different public policy as addressed in Sensient Colors."

Citing our holding in Continental Insurance Co. v. Honeywell International, Inc., 406 N.J. Super. 156 (App. Div. 2009), the judge stated, "the

[6] On November 2, 2020, the New York court granted the insurers' summary judgment motions on the issue of choice of law, concluding New York law governs the action in that matter; Getty appealed. On October 27, 2021, the New York court denied the insurers' summary judgment motions on the pollution and late notice exclusions, finding questions of fact precluded judgment as a matter of law; the insurers appealed. During oral argument before us, the parties advised both appeals are pending.

fact that New Jersey law is more favorable from the standpoint of the policyholders than New York law is not the type of interest that should govern or influence the comity determination." Thus "even the minor issues of substantive law highlighted by Getty here fall short of establishing an injustice in dismissing the case, even when combined with New Jersey's interest in remediating pollution in New Jersey."

Nor was the judge persuaded the record, as supplemented by the parties' post-remand submissions, "compel[led] a finding of gamesmanship as a special equity." The judge explained: "[A]t no point in time leading up to the filing of either the New York or New Jersey action did the insurers communicate an intent to provide coverage for the claims at issue." The judge also noted in our prior opinion we rejected Getty 's argument that he erroneously found "the New York action is more comprehensive." See Getty Props., slip op. at 26.

The judge continued:

> New York, not New Jersey, provides the best and easiest access to relevant and necessary witnesses and documents given New York's connections to this coverage action, including Getty's long-standing relationship with New York and the fact that the policies were negotiated, brokered, issued and delivered in New York. Indeed, the New York court already found that New York's strong interest means it is the appropriate forum for this dispute. The determination of New York court is deserving of

> deference and is in favor of the insurers' position here, even though it is not binding on this court.

The judge also found: "The New York action is in the discovery phase, which is far beyond the motion to dismiss stage here."

Having balanced the special equities, the judge was convinced Getty failed to "overcome the presumption favoring the first-filed action" in New York.

B. Forum Non Conveniens Analysis

Pursuant to our directive, the motion judge also conducted a forum non conveniens analysis. Citing American Home Products, the judge recognized "the general rule favors retention of jurisdiction out of respect for the plaintiff's choice of forum, unless the forum is manifestly inappropriate." See 286 N.J. Super. at 35. Referencing Century Indemnity Co. v. Mine Safety Appliances Co., 398 N.J. Super. 422, 440 (App. Div. 2008), the judge noted a trial court need not defer to the plaintiff's forum selection when the forum "is neither its place of business [n]or its principal place of business." However, the judge also recognized the decision is an "equitable one that rests in the court's sound discretion," and courts must "weigh the private and public interest factors" pursuant to Gulf Oil Corp, 330 U.S. at 508-08. See also Kurzke, 164 N.J. at 165; Getty Props., slip op. at 30-32.

After reciting the public and private interest factors, the judge determined those that applied here "weigh[ed] in favor of dismissal." The judge reasoned: "New York has a greater interest in an insurance coverage dispute regarding policies negotiated and issued . . . within New York's borders," where Getty's "principal place of business and executive offices [are] located." The judge also referenced the existence of the multi-district litigation, which has been pending in the Southern District of New York "for many years."

Noting only "certain sites in one of the three [remediation actions were] located in New Jersey," the judge found "no other New Jersey contacts relevant to this litigation." Among other reasons, the judge found: "The transactions at issue in this litigation occurred in New York and . . . relevant evidence will focus on information concerning the policies and details about Getty's operations." Thus, "New York provides the best and easiest access to witnesses and documents given the claims in dispute." Echoing the New York court's decision, the motion judge found "this dispute largely implicates questions of law regarding the policies."

C. Analysis

In its overlapping arguments on appeal, Getty initially contends the motion judge "largely repeated the same errors" that prompted our remand;

failed to follow the precedents established in Sensient Colors and American Home; and "failed [to] give due consideration to New Jersey's 'dominant' [environmental] interest" or "the divergent public policies of New York and New Jersey." Getty further argues the judge erroneously concluded gamesmanship was not a special equity, and made findings that we rejected in our prior opinion. Secondly, Getty contends the insurers failed to prove "New Jersey is a 'demonstrably inappropriate' forum" under controlling law. See Yousef v. Gen. Dynamics Corp., 205 N.J. 543, 548 (2011). We are unpersuaded.

In his decision, the judge expressly recognized our directive "to reconsider and weigh the special equities at stake and to more fully analyze the forum non conveniens facts." Regarding Getty's special equities argument, the judge fully considered "New Jersey's interest in remediating environmental contamination within its borders" and acknowledged this factor was the "most important special equity" under the Sensient Colors framework. But the judge appropriately rejected Getty's argument that this factor was dispositive. Rather, as the judge recognized, the Court in Sensient Colors held: "The combination of the special equities . . . overc[a]me[] the presumption favoring the first-filed action in New York." 193 N.J. at 394-97. Indeed, in that case, the Court expressly

incorporated the special equities balancing test articulated in American Home Products, 286 N.J. Super. at 37-39. Id. at 390-91.

The judge also followed our directive to consider the significant public policy divergence regarding the pollution exclusion and late notice provisions between the two states, which we noted mirrored those in Sensient Colors. Getty Props., slip op. at 21-23. Contrary to Getty's contentions, we did not instruct the motion judge on remand to find the states' divergent public policies as a special equity as a matter of law. The judge considered this factor but appropriately found any divergence was minor in view of the circumstances presented here. As one notable example, those circumstances include the potential that Getty may be collaterally estopped from arguing New Jersey law applies to the parties' dispute because the New York court decided otherwise on summary judgment. See Watkins v. Resorts Int'l. Hotel & Casino, Inc., 124 N.J. 398, 411 (1991) ("In general, the binding effect of a judgment is determined by the law of the jurisdiction that rendered it."); Genaro Partners, Inc. v. Somwaru, 200 A.D.3d 858, 860 (N.Y. App. Div. 2021) ("An order granting a summary judgment motion is on the merits and has preclusive effect.").

Nor are we convinced the motion judge misapplied the holdings in Sensient Colors and American Home Products. Unlike the present matter, the

special equities in Sensient Colors included: the New Jersey matter was further progressed than the first-filed New York action; the relevant documents and witnesses were located in New Jersey; the plaintiff was persuaded the insurers intended to indemnify; and the further remediation at the site was anticipated. 193 N.J. at 383-84, 393-97. Moreover, the environmental contamination at issue was made by a single entity with long-standing operations in New Jersey and within a single New Jersey site. Id. at 379-80.

None of those equities is present here. Instead, as the judge found, New Jersey's contacts were not "qualitatively and economically predominant," considering Getty sought coverage with respect to all underlying contaminated sites, not only those located in New Jersey's. See id. at 383. Further, the site was the sole contact with this state – the parties or controversy otherwise had no connection to New Jersey. Cf. id. at 383-84.

Additionally, the Supreme Court's strong concern in Sensient Colors that the contaminated site would never be remediated or funded is absent here because Getty settled the lawsuit – at least partially – with the DEP. To be clear, contrary to Getty's contention, the judge did not "h[o]ld that New Jersey's interest in securing insurance coverage for New Jersey environmental liabilities has been extinguished by Getty's . . . settlement of the New Jersey DEP

[l]awsuit." (Emphasis added). Instead, the judge found the settlement here was factually distinguishable from the circumstances in Sensient Colors.

Similarly, the motion judge accurately distinguished the special equities claimed by Getty in the present matter from those found in American Home Products. In that case, we upheld the court's decision that the special equities in the New Jersey action defeated a first-filed suit pertaining to environmental damage claims where: the plaintiff had worldwide headquarters and a legitimate presence in New Jersey; the plaintiff employed 6,000 employees and paid state and local taxes; ten of thirty-seven waste sites were located in New Jersey; six of the insurers were headquartered in this state; New Jersey law was likely to apply to the New Jersey sites; and the New Jersey case was progressing "expeditiously" while the New York action was pending appeal. American Home Products, 286 N.J. Super. at 39-40. Those factors are not at issue here.

Finally, we discern no error in the forum non conveniens analysis conducted by the motion judge. Complying with our instructions, the judge sufficiently considered and aptly applied the relevant public and private interest factors. See Yousef, 205 N.J. at 558. Because the judge's findings under the factors are sufficiently supported by the motion record, his decision warrants our deference. See Kurzke, 164 N.J. at 165.

We conclude the motion judge complied with our instruction to conduct a thorough review – and balancing – of the special equities under the rule of comity, and properly analyzed the forum non conveniens factors. We therefore discern no basis to disturb the judge's decision. To the extent not specifically addressed, Getty's remaining contentions lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.