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The Discovery Rule Applies to Resurrect Consumer Fraud Claim on Property Sale

In a precedential decision, the Superior Court, Appellate Division, in *Catena v. Raytheon Company, et al*., Docket No.: A-4636-13T4 (August 18, 2016), held that the Discovery Rule applied to common law fraud claims as well as fraud claims under New Jersey's Consumer Fraud Act (CFA) in connection with the sale of commercial real property. The six-year statute of limitations was effectively tolled until the plaintiff discovered the wrongdoer knew of the falsity of the statement and intended the plaintiff to rely on it. The plaintiff in the case alleged damages under common law fraud and the CFA because the previous title owner of the property in question (and later others) fraudulently concealed the facts that the property, located in Teterboro, was contaminated and a partial remediation was undertaken but not disclosed. The property was sold to the plaintiff on November 1, 1988. The plaintiff did not file his complaint alleging fraud until August 2005, well beyond the typical six-year statute of limitations under N.J.S.A. 2A:14-1. The Law Division, Bergen County, dismissed the complaint, holding that the plaintiff should have discovered the fraud in June 1998, when he first learned the property was contaminated, and therefore the complaint was filed well beyond the six-year statute of limitations.

The prior owner was apparently aware of the contamination of the property, and in particular, the existence of high levels of perchloroethylene (PCE). In fall 1987, prior to the plaintiff's acquisition of the property, roughly 100 cubic yards of contaminated soil was removed and replaced by clean fill. However, the environmental consultant hired could not guarantee all contamination had been removed from the property. The New Jersey Department of Environmental Protection (NJDEP) was not informed of the remediation. It is not clear from the court's opinion whether the NJDEP was aware of the existence of the contamination.

On October 31, 1988, the day before the sale to the plaintiff, affidavits which had been provided to the NJDEP were provided to the plaintiff by the seller, indicating that "the only occupants of the property since 1984 were a dry wall construction contractor, a bank, and a trucking concern." One of the affidavits noted that "on information and belief" there had not been "any operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling or disposal of hazardous substances or wastes...." Neither of the affidavits indicated that PCE-contaminated soil had been found on the property in 1987.

In 1998, in connection with a refinancing, the plaintiff retained an environmental consultant who concluded PCE contamination existed in excess of NJDEP standards, and in April 1998, the NJDEP was notified of the contamination. It was also discovered there had been historical use of the property for "airplane related industries," which was the "likely cause" of the PCE contamination. The environmental consultant did not discover the fact that 100 cubic yards of contaminated soil had been removed and replaced with clean fill.

Further investigation was undertaken in connection with a Memorandum of Understanding (MOU) with the NJDEP entered into on December 22, 1998, requiring the remediation of the property. A contract was entered into with another environmental consultant after 2001, and in May 2004, the plaintiff was informed by its environmental consultant that groundwater sampling indicated a "larger area of contamination" on the property, including groundwater and stream contamination in what was a "former oil recovery area" used by prior occupants. On August 22, 2005, the plaintiff filed his initial complaint against the prior owner and the successors of other prior owners, asserting claims of common law fraud and violations of the Consumer Fraud Act. During discovery in 2007, it became apparent the prior owner knew that PCE-contaminated soil was excavated, stored, removed and then replaced with clean soil. The plaintiff had not been made aware of these facts prior to 2007. The plaintiff's complaint was amended in February and May 2008, setting forth more detailed common law fraud and CFA claims.

The defendant moved for summary judgment, alleging that the complaint was filed beyond the six-year statute of limitations, and the plaintiff cross-moved for summary judgment. The trial court found that the plaintiff's fraud claims accrued in June 1998 and were therefore time-barred. It does not appear the trial court conducted a preliminary hearing pursuant to *Lopez v. Swyer*, 62 N.J. 267 (1973) as to the issue of the discovery of the fraud by the plaintiff in the context of the statute of limitations.

In reversing the trial court, the Appellate Division noted that "the discovery rule does not toll the statute [of limitations] until the plaintiff has 'legal certainty' of an actionable claim...or until the full extent of the damage becomes apparent.... Mere suspicion that the plaintiff has a claim, however, is not enough." The court further noted that in the context of real estate fraud, misrepresentation "may consist of intentional nondisclosure of a material defect not observable by the buyer." The discovery of the claim "does not occur until the plaintiff is aware of the facts indicating the wrongdoer knew his statement was false, and intended the other party to rely on its falsity." The plaintiff's knowledge of, or access to, publicly available information or proof of industry custom are not determinative of discovery of the claim.

The Appellate Division determined that the ultimate inquiry must be at what point, through the exercise of reasonable diligence, could the plaintiff have discovered the alleged fraud? The court held that "reasonable diligence would not have uncovered facts suggesting fraud" until the plaintiff "filed suit and had the right to compulsory discovery," because it was only through discovery that the plaintiff obtained the requisite information which indicated the prior owner knew about the contamination, performed a cleanup and withheld the information. The Appellate Division found that "there is no evidence that a more-diligent pre-suit investigation would have led to the discovery of the [environmental] reports or other evidence of the 1987 cleanup."

In so doing, the court effectively permitted substantial tolling of the six-year statute of limitations, which arguably started running at the earliest on the date of the sale, November 1, 1988, or as late as 1998, when the PCE contamination was discovered by the plaintiff. The court concluded that under the circumstances, the plaintiff's initial discovery of contamination in 1998 did not constitute discovery that the prior owner concealed knowledge of the contamination and the attempt at subsequent cleanup. The court therefore determined the claims were not time-barred.

The Appellate Division's decision here reinforces the equitable nature of the Discovery Rule in New Jersey jurisprudence. The court emphasized that the Discovery Rule "is designed to avoid harsh results that otherwise would flow from mechanical application of a statute of limitations." In the context of fraud especially, "the victim's lack of awareness of the fraud is the wrongdoer's very object. The rule thus prevents the defendant from benefiting from his own deceit." It is therefore important in the sale of real estate that proper disclosures are made to the buyer, particularly when the property has a history of stigma, whether through contamination or otherwise, lest the seller (or its successors or assigns) be faced with liability, as in this case, from a lawsuit filed 17 years after closing. A seller cannot assume that publicly available information or industry practices in terms of due diligence will suffice as defenses to the application of the Discovery Rule in cases of fraud or consumer fraud.

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