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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1024-12T4

JOHN ROSS and PAMELA ROSS,

Plaintiffs-Appellants,

v.

KAREN A. LOWITZ, f/k/a KAREN A. SANTORA; CALVIN HALEY, SUSAN ELLMAN, NEW JERSEY MANUFACTURERS INSURANCE COMPANY, HIGH POINT PREFERRED INSURANCE COMPANY,

Defendants-Respondents.

STATE FARM FIRE & CASUALTY COMPANY, a/s/o KAREN SANTORA and NEW JERSEY MANUFACTURERS INSURANCE COMPANY a/s/o KAREN SANTORA,

Plaintiffs-Respondents,

v.

SUSAN ELLMAN,

Defendant-Respondent.

Argued December 2, 2013 – Decided March 18, 2014

Before Judges Ashrafi, St. John and Leone.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-5002-07.

Christopher J. Hanlon argued the cause for appellants (Hanlon Niemann, P.C., attorneys; Mr. Hanlon, on the brief).

Peter E. Mueller argued the cause for respondent Karen Lowitz (Harwood Lloyd, LLC, attorneys; Mr. Mueller, of counsel and on the brief; Eileen P. Kuzma, on the brief).

Kevin T. Bright argued the cause for respondents High Point Preferred Insurance Company and Susan Ellman (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Mr. Bright, on the brief).

Jacob S. Grouser argued the cause for respondent New Jersey Manufacturers Insurance Company (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Marc S. Gaffrey, of counsel and on the brief; Daniel R. Kuszmerski and Matthew D. Cassidy, on the brief).

John M. Bowens argued the cause for respondent State Farm Insurance Company (Schenck, Price, Smith & King, LLP, attorneys; Mr. Bowens, and Sandra Calvert Nathans, on the brief).

PER CURIAM

This appeal concerns whether a homeowner's home heating oil that has migrated to another property constitutes a nuisance or a continuing trespass. Plaintiffs John and Pamela Ross appeal from summary judgment entered in favor of defendants, Susan Ellman ("Ellman"), Karen Lowitz f/k/a Karen Santora ("Lowitz"), State Farm Fire & Casualty Company ("State Farm"), and New Jersey Manufacturers Insurance Company ("NJM"). We affirm.

I.

Viewed in the light most favorable to plaintiffs, see R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the summary judgment record reveals the following facts and procedural history.

This matter involves a leak from an underground storage tank ("UST") containing home heating oil on a single-family residential property located at 72 Leighton Avenue. The property was owned by Ellman from 1988 until she sold it to Lowitz on October 1, 1999. During her ownership, Ellman maintained homeowners insurance from High Point Preferred Insurance Company. Before purchasing the property, Lowitz hired ANCO Environmental Services, Inc. to conduct testing of the UST, which did not detect any leakage. Lowitz initially purchased insurance coverage through defendant State Farm and, on March 1, 2003, she acquired insurance coverage through NJM and maintained it until the detection of the leak in September 2003. Upon being notified of the leak, State Farm expended money in cleaning up and remediating the contamination that resulted from the leaking UST.

During her ownership of the property, Lowitz maintained heating oil supply contracts with Fred D. Wikoff Co. ("Wikoff") and Lawes Coal Company, Inc. ("Lawes"). Neither Wikoff nor Lawes ever reported any problem with the tank or oil leakage.

In September 2003, Lowitz entered into an agreement to sell the property. Prior to the closing, Advanced Tank Services, Inc. tested the UST, which revealed a leak. The buyers cancelled the contract.

On July 1, 2004, plaintiff John Ross purchased his home at 66 Leighton Avenue. Plaintiffs were married in 2007. The leaking oil from the UST had migrated to the adjoining properties at 70 Leighton Avenue, 68 Leighton Avenue, and eventually plaintiffs' property. John Ross was aware of the oil contamination at 70 Leighton Avenue in 2004, but was unaware that the oil had migrated onto his property. Plaintiffs offered their home for sale in the fall of 2006, and a contract for sale was signed on May 3, 2007. That same week, plaintiffs were informed by Advanced Environmental Remediation Services, LLC ("AERS"), State Farm and NJM's oversight consultant, of contamination to their property. As a result, the buyers cancelled their contract.

On July 20, 2007, plaintiffs received a letter from Environmental Compliance & Control, Inc. ("ECC"), who had been retained by High Point, requesting access to plaintiffs' property to obtain soil and groundwater samples. On August 7, 2007, plaintiffs' attorney wrote to a representative of State Farm and NJM, explaining plaintiffs' property damages and other disruptions resulting from the oil leak. In October 2007, NJM

and State Farm sent letters to plaintiffs stating that they would each pay a portion of $20,000 for the replacement cost of plaintiffs' deck, pool and retaining wall that would be removed in order to remediate plaintiffs' property.

State Farm and NJM sought damages against Ellman and High Point for contribution towards expenses incurred by them in remediating 72 Leighton Avenue, formerly owned by Ellman from 1988 until 1999, which action was consolidated with the complaint filed by plaintiffs. This matter has since been settled and is not a subject of this appeal.

Plaintiffs' complaint against Lowitz, Ellman, State Farm, NJM, and High Point alleged negligence, strict liability, Spill Act[1] liability, trespass, nuisance and the insurance companies' breach of the covenant of good faith and fair dealing. Plaintiffs sought damages related to clean up and remediation costs as well as loss of use of their property and decline in its value.

In his June 21, 2009 status report to New Jersey Department of Environmental Protection ("DEP"), John Rhodes of CEUS Engineering, P.C. provided the dates of the sampling events between May 2007 and March 2009, showing a gradual improvement

[1] N.J.S.A. 58:10-23.11 to -23.24

in the extent of contamination on plaintiffs' property, but continued concern regarding groundwater samples.

A consent order was entered on August 17, 2009, ordering required relief to plaintiffs during the environmental cleanup. State Farm and NJM agreed that defendants would provide plaintiffs with all pertinent information regarding the cleanup, pay plaintiffs $2,075 per month for plaintiffs' carrying costs, and pay plaintiffs a total of $21,150 in lieu of the obligation to restore plaintiffs' pool, deck, retaining wall and electric improvements. The remediation excavation occurred between September 3, 2009 and October 28, 2009.

A No Further Action letter was issued by the DEP on August 9, 2010. The letter stated that the New Jersey DEP issues "this No Further Action Letter for the remediation of the contamination from #2 heating oil that emanated onto [plaintiff's] property from the 290 gallon underground storage tank previously located at 72 Leighton Avenue." The letter informed plaintiffs that Lowitz is liable for the cleanup and removal costs and remains liable pursuant to the Spill Act. A No Further Action letter from the DEP was also issued for 72 Leighton Avenue on October 11, 2011.

The remediation was paid entirely by State Farm and NJM, and plaintiffs incurred no out-of-pocket expenses. Although a deck and pool were removed from plaintiffs' property during the

remediation process, plaintiffs received compensation, and chose not to replace them. State Farm and NJM have funded 100% of the costs of remediation and compensated plaintiffs for restoration and relocation costs. All remediation has been completed and, on October 11, 2011, the DEP issued a No Further Action letter for all three properties, including plaintiffs' property. As a result, plaintiffs are no longer pursuing their causes of action for the Spill Act and strict liability.

On September 22, 2010, defendant High Point filed a motion for summary judgment. The motion was granted on October 29, 2010. That order is not being appealed. A motion to amend the complaint to add a claim for intentional infliction of emotional distress sustained by Mrs. Ross was filed on October 13, 2010, and denied on October 29, 2010. That order is not being appealed.

Defendant NJM made a motion for summary judgment on November 18, 2010, which was granted on January 7, 2011. Defendant State Farm made a motion for summary judgment that was also granted on January 7, 2011. Plaintiffs filed a motion for leave to file an interlocutory appeal of those orders on January 26, 2011, which we denied. Defendant Ellman moved for summary judgment, which was granted on May 18, 2011. Defendant Lowitz moved for summary judgment, which was granted on July 12, 2011.

Plaintiffs appeal the trial court's decision to dismiss the private nuisance and trespass claims against Ellman and Lowitz, and the bad faith claim against NJM and State Farm.

We review a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). Generally, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c).

The question of defendants' liability turns on whether the migration of the home heating oil onto plaintiffs' property lends itself to identification as a nuisance. "The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." Smith v. Jersey Cent. Power, 421 N.J. Super. 374, 389 (App. Div.), certif. denied, 209 N.J. 96 (2011)(citing Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959)). In determining whether a plaintiff has established an unreasonable interference with the use and enjoyment of land, our courts are guided by the principles set

forth in the Restatement (Second) of Torts § 822 (1979). In this regard § 822 indicates:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.
>
> [Ibid.]

Thus, liability for private nuisance is not imposed without proof of some fault, unless, of course, there is intentional or hazardous activity requiring a higher standard of care, or some compelling policy reason, in which case liability is strict or absolute. Burke v. Briggs, 239 N.J. Super. 269, 273 (App. Div. 1990). The same limitations apply to trespass. Ibid.; Restatement (Second) of Torts § 166 (1965) "Non-liability for Accidental Intrusions" ("Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another . . . does not subject the actor to liability . . . even though the entry causes harm. . . ."). In other words, "[i]n landowner liability cases, strict liability is only applicable where injuries were caused by abnormally dangerous conduct or intentional conduct."

Siddons v. Cook, 382 N.J. Super. 1, 12 (App. Div. 2005); see also Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 488 (1983). As we concluded:

> In other words, regardless of the analysis one might urge and the consequent label attached, be it nuisance, trespass or negligence, the issue here should logically depend on whether the offending landowner somehow has made a negligent or unreasonable use of his land when compared with the rights of the party injured on the adjoining lands. Sans, supra, 29 N.J., at 449 (1959).
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> [Burke, supra, 239 N.J. Super. at 274.]

Citing Biniek v. Exxon Mobil Corp., 358 N.J. Super. 587 (Law Div. 2002), defendants contend that, as a matter of law, the use of an underground storage tank for home heating oil is not an abnormally dangerous activity to which strict liability may attach. In Biniek, the court, in deciding a motion for summary judgment, determined that a gas station's storage of gasoline in USTs was not subject to the doctrine of abnormally dangerous activity, and the defendant could not be held strictly liable for its role in either the supply or storage of gasoline at the site in question. Id. at 598-602. The Biniek court observed:

> With respect to these claims of strict liability, New Jersey has adopted the doctrine of abnormally dangerous activity. This doctrine imposes liability on those who, despite social utility, introduce an extraordinary risk of harm into the community for their own benefit. Although

> the law will tolerate such hazardous conduct, the risk of loss is allocated to the enterpriser who engages in it. To determine the doctrine's applicability, New Jersey has adopted the principles set forth in Restatement of Torts, 2d.
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> . . . .
>
> [W]hether an activity is abnormally dangerous is to be determined on a case by case basis. In considering the issue, a court is guided by the following factors:
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> (a) existence of a high degree of risk of harm to the person, land, or chattels of others;
> (b) likelihood that great harm would result therefrom;
> (c) the inability to eliminate those risks through the exercise of reasonable care;
> (d) the common usage of the activity;
> (e) the appropriateness of the activity; and
> (f) the value of the activity to the community.
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> [Id. at 598-99 (citing Restatement (Second) of Torts § 520 (1977))(internal citations omitted).]

Here, the motion judge determined that the record supports that "no reasonable juror could conclude that Lowitz did not do everything she could to diligently and reasonably maintain the UST." He also determined that Ellman was not negligent and therefore not liable for trespass or nuisance. We agree that the migration of the oil was not caused by an intentional or negligent act of either Lowitz or Ellman. Further, we are in accord with the motion judge and conclude that a homeowner's use

of an underground storage tank for home heating oil is not an abnormally dangerous activity to which strict liability may attach, considering the criteria adopted in Ventron, supra, 94 N.J. at 488, 491. We conclude that the motion judge properly granted summary judgment to Ellman and Lowitz.

II.

Plaintiffs also argue that the motion judge erred in dismissing their claims against State Farm and NJM for bad faith in the processing of the claim brought by them against Lowitz. Judge Bauman, in a comprehensive written statement of reasons, determined that there was "no basis as a matter of law for Plaintiffs to assert direct claims alleging breach of the covenant of good faith and fair dealing against the Defendant insurance companies" given no fiduciary duty or any "special relationship" between them. We agree.

We note first that plaintiffs, as persons purportedly injured by the carriers' insured, are precluded from filing a direct claim against the insurance companies absent an assignment of rights. See Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 165 (App. Div. 1986), appeal dismissed, 110 N.J. 293 (1988); Biasi v. Allstate Ins. Co., 104 N.J. Super. 155 (App. Div.), certif. denied, 53 N.J. 511 (1969).

Nor do we agree that plaintiffs are third-party beneficiaries to the contracts of insurance who are therefore

entitled to make a direct claim against the policies. Third-party beneficiary status arises where the parties to the contract intended at the outset to confer a benefit on the third-party sufficient to enforce it in court. See Broadway Maintenance Corp. v. Rutgers, 90 N.J. 253 (1982); Brooklawn v. Brooklawn Housing Corp., 124 N.J.L. 73, 77 (E. & A. 1940).

Plaintiff relies on several cases including Werrmann v. Aratusa, Ltd., 266 N.J. Super. 471 (App. Div. 1993); and Eschle v. Eastern Freight Ways, Inc., 128 N.J. Super. 299 (Law Div. 1974), for the proposition that plaintiffs are third-party beneficiaries of the carriers' policies issued to Lowitz. Those cases are inapplicable. Each involves broker liability to third parties arising from the breach of a contractual duty to the insured to procure or maintain insurance coverage. The public policy reasons for finding a duty by an insurance agent to members of the general public and for finding third-party beneficiary status of members of the public to the contract between the insured and broker, do not translate to the circumstances here.

There is no basis, including public policy considerations, on which to conclude that these insurers intended, or should be compelled, to confer a direct right upon these plaintiffs merely by issuing insurance policies to Lowitz.

Affirmed.