SUPREME COURT OF NEW JERSEY

	NO. 080859
New Jersey Department of Environmental Protection Plaintiff-Respondent, v. Exxon Mobil Corporation Defendant-Respondent.	CIVIL ACTION **ON PETITION FOR CERTIFICATION FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** App. Div. Dkt. Nos.: A-0810-15-15T1; A-0668-15T1 Sat Below: Hon. Carmen Messano, P.J.A.D., Hon. Amy O'Connor, J.A.D. and Hon. Francis J. Vernoia, J.A.D. Law Div. Dkt. No.: L-3026-04 (consolidated with L-1650-05) Hon. Michael J. Hogan, J.S.C. (RET. ON RECALL)

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT EXXON MOBIL CORPORATION IN OPPOSITION TO PETITION FOR CERTIFICATION FILED BY NEW JERSEY SIERRA CLUB, CLEAN WATER ACTION, ENVIRONMENT NEW JERSEY, AND DELAWARE RIVERKEEPER

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TABLE OF CONTENTS

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE MATTER INVOLVED

In 2015, Exxon Mobil Corporation ("ExxonMobil") and the New Jersey Department of Environmental Protection (the "DEP") reached a carefully negotiated settlement after 11 years of hard-fought litigation. Petitioners[1] nonetheless delayed this matter's final resolution for more than three years, despite lacking standing and failing to satisfy this Court's intervention rules. Now, following thorough decisions regarding the settlement from both the trial court and the Appellate Division, Petitioners' attempt to further delay this litigation should be rejected.

The parties' negotiations regarding the Bayway and Bayonne sites began more than 25 years ago. Since that time, the sites have been the subject of two Administrative Consent Orders ("ACOs") and this natural resource damages ("NRD") litigation. The issues concerning these sites have been thoroughly aired in thousands of pages of briefs, expert reports, deposition transcripts, judicial decisions, and an eight-month bench trial.

Despite being complete strangers to all of this, Petitioners sought to intervene at the eleventh hour, only after the parties announced their settlement. The trial court rejected Petitioners' intervention, but allowed their

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[1] The petitioners in this action are the New Jersey Sierra Club, Clean Water Action, Environment New Jersey, and the Delaware Riverkeeper ("Petitioners").

participation as amici curiae. The court addressed each of their arguments on the merits in approving the consent judgment, and the Appellate Division then affirmed the trial court's well-reasoned decision.

Although the underlying facts of this litigation are complex, the Appellate Division's decision is not. That decision, like the trial court's decision before it, simply applied longstanding and well-established principles of law within the context of New Jersey's Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq. (the "Spill Act").

First, the Appellate Division's holding that Petitioners must have standing in order to intervene is uncontroversial. Standing is a basic element of justiciability. The Spill Act expressly provides that only the DEP may pursue claims for NRD.

Second, the Appellate Division's decision promotes the efficient functioning of the court system. It ensures that only those with standing can become parties to judicial proceedings, but still preserves the ability of courts to hear the perspectives of non-parties, like Petitioners, as amici.

Third, and finally, the Appellate Division's decision creates no additional limits on the public's access to the courts, nor does it limit government accountability. Rather, it upholds and promotes the Spill Act's statutory framework and goal of protecting New Jersey's natural resources.

In short, Petitioners' petition for certification (the "Petition") identifies no ground on which certification should be granted and raises no issue in need of resolution by this Court. Accordingly, this Court should deny the Petition and allow this litigation to come to a long-overdue end.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[2]

In 1991, ExxonMobil and the DEP entered into ACOs for the Bayway and Bayonne sites. Ever since, ExxonMobil has been remediating both sites, spending over $250 million on such remediation as of December 31, 2014. (Aa51.) ExxonMobil has also been investigating and remediating the Paulsboro Terminal site under the oversight and approval of the DEP. (DAa21.)

In August 2004, the DEP filed complaints against ExxonMobil for alleged NRD at the Bayway and Bayonne sites. After extensive motion practice and discovery, these cases went to trial in January 2014. The trial lasted approximately eight months, with a total of 66 trial days. The trial included 20 fact witnesses and 14 proffered experts. (Aa60.) At the

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[2] ExxonMobil provides a brief summary of the procedural history and facts relevant to the Petition. A more complete recounting of the facts and procedural history of this litigation is set forth in ExxonMobil's brief before the Appellate Division.

As referenced herein, Defendant's Appendix or "Da" means ExxonMobil's appendix to this opposition, "DAa" means ExxonMobil's Appellate Division Appendix, "Pet." means the Petition, "Pa" means the appendix thereto, "App. Div. Br." means Petitioners' brief before the Appellate Division, and "Aa" means Petitioners' appendix thereto.

conclusion of the trial, the parties' Rule 104 motions - challenging seven of the DEP's eight proffered experts and all six of ExxonMobil's proffered experts - remained pending.

On February 20, 2015, the DEP and ExxonMobil announced they had reached a settlement. (See Aa60.) The DEP provided an extended notice and comment period and received over 16,000 comments (including comments from Petitioners) on the proposed settlement. (Aa399.) On June 9, 2015, Petitioners filed a motion to intervene. (See Aa63.) Then-Senator Raymond J. Lesniak filed a motion to intervene 10 days later. (See ibid.)

After reviewing public comments - including from Petitioners - and providing an 87-page public response on July 9, 2015, the DEP concluded that the proposed consent judgment was "fair, reasonable and consistent with the purpose of the Spill Act" and formally submitted the same to the trial court for approval. (Aa63 n.59; 399.) On July 13, 2015, the trial court denied the pending motions to intervene, but nonetheless permitted Petitioners and Mr. Lesniak to file briefs and present oral arguments as amici. (Aa64.)

On August 25, 2015, the trial court entered an 81-page decision approving the settlement between the DEP and ExxonMobil. (Aa47-128.) In September 2015, Petitioners and Mr. Lesniak renewed their respective motions to intervene before the trial court for purposes of taking an appeal. (Aa173.) The

trial court denied the renewed motions, and Petitioners appealed. (Aa219.)

On February 12, 2018, the Appellate Division issued its decision affirming the trial court's approval of the settlement. (Pa1, 47.) In that decision, the Appellate Division held that intervenors must demonstrate standing (Pa18-19), and that, although the trial court correctly found that Petitioners could not intervene at trial, they could do so for appeal (Pa25-26, 38).

ARGUMENT

None of the issues raised in the Petition justifies certification under Rule 2:12-4. First, no conflict exists with respect to the requirement of standing for intervention. Second, this case does not call for "an exercise of the Supreme Court's supervision" because the Appellate Division's ruling promotes, rather than undermines, the efficient functioning of the court system. Third, the Appellate Division's ruling does not implicate any "question of general public importance;" rather, it represents a straightforward, fact-specific application of the well-established standing requirement. Accordingly, ExxonMobil submits that the Petition should be **DENIED.**

I. NO CONFLICT EXISTS IN NEW JERSEY LAW: STANDING IS A THRESHOLD REQUIREMENT FOR INTERVENTION

Petitioners attempt to manufacture a conflict by ignoring New Jersey courts' well-settled standing jurisprudence. As the Appellate Division explained, New Jersey courts agree that a party bringing a claim must demonstrate standing because "[s]tanding is a threshold requirement for justiciability." Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 421 (1991); (see also Pa19-20 (collecting cases)). Where a party lacks standing, the court is precluded "from entertaining any of the substantive issues for determination." EnviroFinance Grp. v. Envtl. Barrier Co., 440 N.J. Super. 325, 339 (App. Div. 2015) (citation omitted). And, because intervention grants the intervenor status as a party, it is equally uncontroversial that intervenors must demonstrate standing. Sylvia B. Pressler & Peter G. Verniero, Rules Governing the Courts of the State of New Jersey, cmt. 1 on R. 4:33-2 (2018 ed.) ("Clearly those without standing in the first instance are also without sufficient interest to warrant intervention."); see also Williams v. State, 375 N.J. Super. 485, 530 (App. Div. 2005) (noting that intervenors become parties to an action).

As the Appellate Division correctly recognized, this Court's intervention rules themselves provide the mechanism by which a putative intervenor must demonstrate its standing.

(Pa12-13.) Specifically, Rule 4:33-3 requires that any non-party seeking intervention must file a pleading setting forth its "claim or defense." R. 4:33-3. If the non-party lacks a viable "claim or defense," it cannot intervene.[3] See R. 4:33-3; Pressler & Verniero, cmt. 1 on R. 4:33-2.[4]

Faced with this reality, Petitioners misleadingly state that there "is simply no Appellate Division decision other than the one complained of here that requires movants for intervention to demonstrate standing." (Pet. 14) Not so.

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[3] As the Appellate Division explained, it would be "illogical" if the Court had no choice but to allow intervention even where the movant lacked a "claim or defense." (Pa13.)

[4] Unable to rebut the clear language in Rule 4:33-3, Petitioners attempt to minimize the requirement as merely procedural. (Pet. 8.) But they cite only a handful of cases, and none supports their position. First, as Petitioners acknowledge, they cite two cases that had no occasion to opine on standing as it relates to Rule 4:33-3. (Pet. 9-10); see Howell Twp. v. Waste Disposal, Inc., 207 N.J. Super. 80, 100 (App. Div. 1986) (noting that the township never filed a motion to intervene); UFJ Bank Ltd. v. J&A Int'l Corp., 354 N.J. Super. 542, 546 (Ch. Div. 2002) (finding motion to intervene moot because parties stipulated to dismissal while motion was pending). Second, they cite two cases that actually support the Appellate Division's holding that standing is a prerequisite for intervention. See Mobil Admin. Serv. Co. v. Mansfield Twp., 15 N.J. Tax 583, 587-88 (1996) (noting that questions of "standing" are "applicable to all litigation" (emphasis added)); ACLU of N.J., Inc. v. Cty. of Hudson, 352 N.J. Super. 44, 64-65, 68 (App. Div. 2002) (finding that the United States had sufficient interest to intervene where "disclosure of the requested information will have a direct and immediate impact on government law enforcement investigation and personnel" (emphasis added)). In any event, a party filing a pleading — whether for intervention or initiating a lawsuit — must have standing for the claims in that pleading to be adjudicable.

Courts throughout New Jersey have repeatedly discussed standing in determining whether to grant motions to intervene. (See Pa13-14 (collecting cases)); see, e.g., State v. N.J. Zinc Co., 40 N.J. 560, 575 (1963) (stating that movant must do more than claim "an interest in the property in order . . . to permit him to intervene on his own motion"); N.J. Div. of Youth & Family Servs. v. D.P., 422 N.J. Super. 583, 602-03 (App. Div. 2011) (holding that applicant's concerns did not "otherwise confer an interest permitting standing to intervene"); In re A.S., 388 N.J. Super. 521, 526 (App. Div. 2006) (affirming trial court's denial of intervention because applicant lacked a "cognizable legal interest" and, therefore, lacked standing); Loigman v. Twp. Comm. of Middletown, 297 N.J. Super. 287, 292 (App. Div. 1997) (holding that taxpayer "lacks standing to enforce a public sector labor agreement").[5]

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[5] Petitioners cherry-pick four cases on which the Appellate Division relied, arguing that these cases do not support the "addition" of a standing requirement to the four-prong test for intervention under Rule 4:33-1. (Pet. 11-12 (discussing Appellate Division's citation to N.J. Division of Youth and Family Services, In re A.S., N.J. Zinc Co., and Woodbridge State School Parents Association v. American Federation of State, County & Municipal Employees, 180 N.J. Super. 501 (Law. Div. 1981)).) As an initial matter, the Appellate Division did not cite directly to Woodbridge; rather, it cited Loigman, discussed above, which the Appellate Division noted had cited Woodbridge approvingly. In any event, as previously discussed, standing is not an "additional" requirement. It is a basic, threshold requirement that is required for every party bringing a claim in every case. Moreover, each of these cases supports that basic proposition. For instance, Petitioners argue that N.J. Division

In denying Petitioners' motion, trial court Judge Michael J. Hogan, too, cited several cases holding that putative intervenors must demonstrate standing. (See Aa178 (October 9, 2015 Order).)[6] Other courts have agreed with his interpretation of New Jersey law. See, e.g., Bergen Cty. Improvement Auth. & Bergen Cty. v. Bergen Reg'l Med. Ctr., LP, No. A-0050-16T4, 2018 N.J. Super. Unpub. LEXIS 487 (App. Div. Mar. 2, 2018) (slip op. at 7) (discussing standing as a prerequisite to intervention) (Da3); Powerhouse First, LLC v. Waldo Jersey City, LLC, No. A-0655-13T4, 2016 N.J. Super. Unpub. LEXIS 1488 (App. Div. June 28, 2016) (slip op. at 10-13) (same) (Da7-9); see also Farmland Dairies, Inc. v. Borough of Wallington, 29 N.J. Tax 310, 312

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of Youth and Family Services is inapposite because it involved a specific statute that denied "resource parents status as a party [and thus] equally restrict[ed] [those parents'] right to intervene to act like a party." 422 N.J. Super. at 590. However, that the case involved a statute that denied certain persons standing makes it only more analogous to this matter, not less so. Petitioners ignore that here, too, there is an operative statute (i.e., the Spill Act) that denies certain persons (i.e., anyone except for the DEP) standing to bring certain claims. (See Pa21 (explaining that, under the Spill Act, "only [the] DEP may recover cleanup costs and other damages from responsible parties").)

[6] See VW Credit, Inc. v. Coast Automotive Grp., Ltd., 346 N.J. Super. 326, 334 (App. Div. 2002) (holding that third party could intervene after finding that it had "standing to proceed" as an "indispensable intervening party"); see also Warner Co. v. Sutton, 270 N.J. Super. 658, 664 n.1 (App. Div. 1994) (holding that intervention was appropriate because applicants had "standing"); Mobil Admin. Serv., 15 N.J. Tax at 587-88 (holding that standing is a prerequisite to intervention).

(2016) (explaining that standing is a prerequisite for intervention), aff'd in relevant part by No. A-3523-16T4, 2017 N.J. Super. Unpub. LEXIS 2813 (App. Div. Nov. 13, 2017).[7]

Given the clear authority that standing is a threshold requirement - and the lack of any case to the contrary - Petitioners resort to three additional meritless arguments.

First, Petitioners attempt to support their standing argument by pointing to cases either (1) noting New Jersey's liberal treatment of standing and intervention, or (2) analyzing only the general four-prong test for intervention under Rule 4:33-1.[8] (Pet. 14.) None of these cases, however, supports Petitioners' position that intervention would be appropriate absent standing. To the contrary, they actually confirm that movants for intervention must demonstrate a cognizable legal interest or, in other words, standing. See ACLU of N.J., 352

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[7] In accordance with Rules 1:36-3 and 2:6-3, copies of unreported decisions are included in ExxonMobil's Appendix, attached hereto. Counsel is unaware of any reported or unreported decisions contrary to the relevant holdings in these decisions.

[8] Under New Jersey law, movants can intervene as of right only if they are able to: (1) claim an interest relating to the property or transaction which is the subject of the action; (2) show that their interest may be impaired or impeded if they are not permitted to intervene; (3) demonstrate that their interest is not adequately represented by the existing parties; and (4) make a timely application to intervene. R. 4:33-1; accord Chesterbrooke Ltd. P'ship v. Planning Bd. of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989). ExxonMobil does not address herein whether Petitioners satisfy these factors because Petitioners do not do so in their Petition.

N.J. Super. at 67-68 (holding that the United States had a sufficient interest where "disclosure of the requested information will have a direct and immediate impact on government law enforcement investigation and personnel"); see also Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 569 (App. Div. 1998) (finding that non-parties owning neighboring property had a cognizable interest); Chesterbrooke Ltd. P'ship, 237 N.J. Super. at 124 (same).[9]

Second, Petitioners misrepresent the Appellate Division's discussion regarding the standards for joinder and intervention. Petitioners argue that the Appellate Division erred in conflating the two standards. However, the Appellate Division did no such thing. Although the Appellate Division noted that the standards are "comparable," it specifically explained that they are not identical. (Pa14-15 (noting the intervention rules' additional adequacy of representation requirement).) The

[9] Even if this Court were to accept Petitioners' position that a movant need not demonstrate standing separate and apart from the four prongs of Rule 4:33-1, the language in Rule 4:33-1 itself indicates that standing is still required. As the Appellate Division explained, Rule 4:33-1 requires that an applicant for intervention demonstrate an "interest" in the "subject of the action," which may be "impair[ed] or impede[d]" without intervention. (Pa18.) Such language closely tracks the language that this Court has used in its standing jurisprudence. See In re Camden Cty., 170 N.J. 439, 449 (2002) (holding that "a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision").

Appellate Division referenced the joinder rules only to note that a court must grant intervention under Rule 4:33-1 if a putative "intervenor's status is comparable to that of a party that must be mandatorily joined" under Rule 4:28-1.[10] (Pa14-15.) This statement is accurate and entirely uncontroversial. It does not remotely suggest that the Appellate Division improperly conflated the two standards. See Pressler & Verniero, cmt. 1 on R. 4:33-1.

Third, Petitioners manufacture a non-issue by arguing that New Jersey courts cannot look to federal law where New Jersey law exists. As an initial matter, the Appellate Division's standing ruling relies primarily on New Jersey law, not federal cases. (Pa13-18.) The Appellate Division cited federal law only for guidance, explicitly recognizing that it was not bound by the same. (Pa17-18.) But, more importantly, Petitioners lack any support for their position that New Jersey courts are barred from considering federal cases. Indeed, courts routinely look to federal law even where New Jersey law exists.[11] See,

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[10] Rule 4:28-1 provides, in relevant part, that a person subject to service of process must be joined as a party if "the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest."

[11] Reference to federal law is particularly appropriate here because New Jersey intervention rules are "taken substantially from [Fed. R. Civ. P.] 24." Twp. of Hanover v. Town of Morristown, 118 N.J. Super. 136, 150 (Ch. Div. 1972); see also

e.g., State v. Gilmore, 103 N.J. 508, 523-24 (1983) (citing federal cases "for the purpose of guidance" in interpreting New Jersey's constitution).

II. THIS CASE DOES NOT REQUIRE THIS COURT'S SUPERVISION: THE APPELLATE DIVISION'S DECISION UPHOLDS THE EFFICIENT FUNCTIONING OF THE COURT SYSTEM

Petitioners next contend that this appeal calls for this Court's supervision because the Appellate Division's decision undermines the "efficient functioning of the court system." (Pet. 14.) Specifically, Petitioners argue that the decision deprives courts of the ability to review matters on a complete record.[12] Petitioners are incorrect, as the facts of this case demonstrate.

Pressler & Verniero, cmt. 1 on R. 4:33-1 ("R. 4:33-1 follows Fed. R. Civ. P. 24(a) verbatim."). In such situations, New Jersey courts may "look to the federal decisions for guidance." Testut v. Testut, 32 N.J. Super. 95, 99 (App. Div. 1954) (citing Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338 (1951)).

[12] Petitioners also take issue with the Appellate Division's finding that Petitioners could intervene for purposes of appeal, but not at trial. (Pet. 14-15.) ExxonMobil maintains that Petitioners did not have standing at any stage. However, the Appellate Division's ruling that Petitioners could intervene involved a fact-specific application of the well-established requirements for intervention. The Appellate Division discussed the Spill Act's statutory framework, Petitioners' interest in the litigation, and whether the DEP continued to adequately represent Petitioners' interest. (Pa35-38.) In short, this fact-specific inquiry does not warrant this Court's review. See, e.g., In re Contract for Route 280, 89 N.J. 1, 1 (1982) (finding no grounds for certification, in part because the final judgment was only an application of previously established principles, and there was no conflict among judicial decisions that required clarification).

First, the record before the trial court here was more than complete. Judge Hogan presided over a 66-day trial, which included 20 fact witnesses, 14 expert witnesses, and more than 45,000 pages of exhibits admitted into evidence. He entertained numerous evidentiary, in limine, and Rule 104 motions, and reviewed over 1,000 pages of post-trial briefs, findings of fact, and conclusions of law. Petitioners simply had nothing to add to this voluminous record - a point they were forced to acknowledge before Judge Hogan. (See App. Div. Br. 44.)[13]

Second, the procedural history of this case disproves Petitioners' contrived theory that requiring standing would deprive courts of the "unique" perspectives of concerned parties.[14] Judge Hogan granted Petitioners status as amici, permitting them to file briefs and present oral arguments in opposition to the settlement. (See Aa64.) Petitioners were thus afforded the opportunity to present the court with any argument they wished to make, and then Judge Hogan

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[13] In fact, Petitioners did not attend a single day of trial, nor did they review the trial transcripts, the motions filed, or evidence from the case. Furthermore, Petitioners failed to order any of the trial transcripts for the Appellate Division appeal, highlighting their ignorance of, and lack of appreciation for, the actual facts and arguments leading to the settlement at issue. (See Pa4-5 n.1.)

[14] Petitioners similarly argue that standing undermines courts' ability to make fair and informed decisions. (Pet. 18.) Yet, because the trial court and the Appellate Division considered each and every argument that Petitioners wished to make against the proposed consent judgment, this argument, too, must fail.

comprehensively addressed Petitioners' arguments in an 81-page order approving the settlement agreement. By considering Petitioners' arguments as amici, the trial court furthered the efficient functioning of the court system, guarding against needless delay by entities without standing while still ensuring that Petitioners were able to offer their perspective.

III. THE APPELLATE DIVISION'S DECISION DOES NOT OTHERWISE IMPLICATE MATTERS OF "GENERAL PUBLIC IMPORTANCE"

Finally, Petitioners argue that the Appellate Division's ruling implicates matters of "general public importance" because, according to Petitioners, it (1) inappropriately limits the public's access to courts, (2) limits government accountability, and (3) raises litigation costs. All of these arguments are without merit.

A. The Appellate Division's Decision Does Not Unduly Restrict the Public's Access to Courts

Petitioners argue that requiring standing for intervention limits the public's access to the courts. ExxonMobil does not disagree. But that is exactly what the standing doctrine is intended to do - promote judicial efficiency and separation of powers by restricting court access to only those with a legally cognizable interest. See Indep. Energy Producers of N.J. v. N.J. Dep't of Envtl. Prot., 275 N.J. Super. 46, 55 (App. Div. 1994) (noting that New Jersey courts have "long recognized" their "authority is confined to deciding questions presented in

an adversary context in a form capable of resolution through the judicial process" (citation omitted)).[15]

The Appellate Division's ruling here does not create any additional barriers. It simply upholds longstanding and time-honored principles of law. See Watkins, 124 N.J. at 421.

B. Requiring Standing Does Not Limit Government Accountability

Petitioners are also incorrect that the standing requirement somehow limits government accountability. According to Petitioners, the Environmental Rights Act, N.J.S.A. 2A:35A-1, et seq. (the "ERA"), demonstrates the Legislature's intent to give private parties access to courts to address environmental harms. But Petitioners ignore the totality of the statutory framework. The Spill Act and the ERA specifically circumscribe the standing of third parties to litigate environmental harms.

First, the Spill Act provides no private right of action for recovery of NRD and instead entrusts the DEP with the exclusive right to "commence a civil action in Superior Court for . . . the cost of restoration and replacement, where

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[15] In support of their argument, Petitioners cite only one case - D'Amore v. D'Amore, 186 N.J. Super. 525 (App. Div. 1982) - for the general proposition that there is a "'fundamental right of the public to access to the courts in order to secure adjudication of claims on their merits.'" (Pet. 17 (citing D'Amore, 186 N.J. Super. at 530)). D'Amore, however, did not even address standing, let alone suggest that the standing requirement can be relaxed simply to afford non-parties expanded access to the courts.

practicable, of any natural resource damaged or destroyed by a discharge."[16] N.J.S.A. 58:10-23.11u.b(4); (see also Pa21-22). Only after the DEP decides to settle an action for NRD can the public then participate, through the notice-and-comment process. N.J.S.A 58:10-23.11e2.

Second, the ERA provides only one, narrow circumstance in which third parties can bring private actions for environmental harms – namely, when there has been "inaction by the government, which retains primary prosecutorial responsibility." Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 58 (App. Div. 1987); see also Howell, 207 N.J. Super. at 95 (stating that the DEP "is entrusted initially with the right to determine the primary cause of action to be taken against persons who damage or threaten the environment"). Here, Petitioners cannot seriously claim that the DEP somehow abrogated its duty, particularly given that the DEP has been monitoring the sites at issue for over 25 years and has aggressively litigated this action since 2004, when it was filed.[17]

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[16] Unlike other New Jersey and federal statutes, the Spill Act does not include a citizen suit provision, reflecting the Legislature's intent to not provide one. See, e.g., Clean Water Act, 33 U.S.C. § 1365(b)(1)(B); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(i).

[17] The ERA also has other limits, which additionally bar Petitioners from pursuing a claim here. Specifically, the ERA is limited to injunctive relief, declaratory relief, and civil penalties - not the type of damages or clean-up costs at issue

Thus, neither the Spill Act nor the ERA provides any support for Petitioners' position that the Legislature intended to allow members of the public, otherwise without standing, to intervene in any NRD action brought by the DEP.

C. The Standing Requirement Does Not Raise Litigation Costs

Finally, Petitioners argue that requiring standing for intervention would unnecessarily increase litigation costs. Petitioners claim that if "standing is required for intervention, interested persons may be foreclosed from intervention and forced to bring similar issues before the court outside of the initial litigation for which intervention has been denied." (Pet. 19-20.) This is nonsensical.

If putative intervenors lack standing to intervene, then, by definition, they also lack standing to bring an independent action addressing the same issues. See Pressler & Verniero, cmt. 1 on R. 4:33-1. Requiring standing, therefore, does not,

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in this litigation. N.J.S.A. 2A:35A-4(a)-(b); see also Superior Air Prods. Co., 216 N.J. Super. at 58 (stating that the "ERA does not itself provide any substantive cause of action"); Allied Corp. v. Frola, 701 F. Supp. 1084, 1091 (D.N.J. 1988), abrogated on other grounds by Agpar v. Lederle Labs, 123 N.J. 450 (1991) (holding that "substantive rights under the Spill Act through the ERA cannot exceed their substantive rights under the Spill Act directly"). Moreover, the ERA provides for only prospective relief to prevent future violations rather than redress for past ones. See Pannaccione v. Holowiak, No. A-5461-06T3, 2008 N.J. Super. Unpub. LEXIS 1809 (App. Div. Nov. 12, 2008) (slip op. at 11-12) (Da16-17).

as Petitioners suggest, result in piecemeal litigation and increased costs.

By contrast, if groups without standing - like Petitioners here - were allowed to intervene, it would needlessly expand the scope of litigation, cause significant delays (above and beyond those already sustained here), and prejudice the rights of the parties, who actually have legally cognizable interests in the subject matter of the litigation. In applying the well-settled standing requirement here, the Appellate Division thus furthered the public's interest in the efficient resolution of judicial disputes.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

Dated: March 29, 2018

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Appendix to Defendant-Respondent Exxon Mobil Corporation's Brief in Opposition to the Petition

Bergen Cty. Improvement Auth. v. Bergen Reg'l Med. Ctr., LP

Superior Court of New Jersey, Appellate Division

October 30, 2017, Argued; March 2, 2018, Decided

DOCKET NO. A-0050-16T4

Reporter
2018 N.J. Super. Unpub. LEXIS 487 *; 2018 WL 1122421

BERGEN COUNTY IMPROVEMENT AUTHORITY AND BERGEN COUNTY, Plaintiffs-Respondents, v. BERGEN REGIONAL MEDICAL CENTER, LP, SOLOMON HEALTH GROUP, LLC, SOLOMON HEALTHCARE GROUP, LLC, GLOBAL EMPLOYEE BENEFITS MANAGEMENT, LLC, BERGEN REGIONAL ANESTHESIOLOGY GROUP, PA, BERGEN REGIONAL MEDICAL CENTER RADIOLOGY ASSOCIATES, PA, LIFE SOURCE SERVICES, LP, INTERNATIONAL INFORMATION TECHNOLOGIES, LP, CURRENT ELEVATOR TECHNOLOGY, INC, JOSEPH GLASKI, HERMAN LINDENBAUM, DAVID SEBBAG, UNITED STATES ELEVATOR, INC., ELNATAN RUDOLPH, Defendants, and EDWARD H. HYNES, Defendant-Respondent, and BERGEN REGIONAL MEDICAL CENTER, LP, Third-Party Plaintiff, v. COUNTY OF BERGEN, JOHN M. CARBONE, in his capacity as the Bergen County Adjuster, and PROPOCO, INC. d/b/a PROFESSIONAL SERVICES, Third-Party Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0374-12.

Bergen County Improvement Auth. v. Bergen Reg'l Med. Ctr., 2012 U.S. Dist. LEXIS 81891 (D.N.J., June 7, 2012)

Core Terms

aggrieved, intervene

Counsel: Ronald L. Israel argued the cause for Pro se appellant Chiesa Shahinian & Giantomasi, PC.

Padraig P. Flanagan argued the cause for respondents Bergen County Improvement Authority and the County of Bergen (Florio Perrucci Steinhardt & Fader, attorneys; Brian R. Tipton, on the brief).

Michael J. Breslin, Jr., argued the cause for respondent Edward H. Hynes.

Judges: Before Judges O'Connor and Vernoia.

Opinion

PER CURIAM

Appellant is the law firm Chiesa Shahinian & Giantomasi PC, which has claimed to be the successor of the firm Wolff & Samson PC (Wolff). At one time, Wolff represented plaintiff Bergen County Improvement Authority (Authority) in this matter. Neither appellant nor Wolff have ever been parties to this litigation.

Appellant appeals from a September 1, 2015 order compelling the Authority and plaintiff County of Bergen to pay defendant Edward H. Hynes's attorney $180,465.50 in counsel fees and $4854.20 in costs, pursuant to N.J.S.A. 2A:15-59.1. We dismiss this appeal because appellant failed to file a motion for leave to intervene.

I

From 2003 to 2012, defendant Hynes was the executive director of the Authority. In addition **[*2]** to its many functions, the Authority was in part responsible for the management of defendant Bergen Regional Medical Center (hospital). In 2012, Wolff filed a complaint in federal district court on behalf of the Authority, alleging defendants engaged in various acts of wrongdoing, none of which is pertinent here. Defendant Hynes was not named in that complaint.

Later that year, Wolff filed a second amended complaint on the Authority's behalf naming Hynes as a defendant.[1] The Authority alleged an elevator company had billed the hospital for repair and maintenance services the company had not in fact provided, and the company also billed for materials the company had never supplied to the hospital. Hynes approved the payment of these fraudulent bills. Further, when he did so, he signed the form of certification pre-printed on each voucher, which stated "I hereby certify from personal knowledge that all of the goods and services charged for in the within claim have been received and rendered."

The Authority alleged Hynes's misrepresentations the subject services had been performed and the materials supplied constituted a malicious breach of his fiduciary and contractual duties to the Authority. **[*3]** However, the Authority did not allege Hynes colluded with or was in fact aware the elevator company had overbilled and defrauded the hospital.

In 2014, Wolff was substituted as counsel by Archer & Greiner and, in 2015, Archer & Greiner was substituted by Florio Perrucci Steinhardt & Fader. Thereafter, the court granted Hynes's unopposed motion for summary judgment. Believing the claims against him had been frivolous, Hynes filed an application for sanctions in the form of counsel fees and costs against appellant and both plaintiffs, pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1.

By order dated September 1, 2015, the court granted Hynes's request for sanctions against plaintiffs, directing they reimburse his counsel $185,319.79 in the aggregate for fees and costs. In its oral findings[2], the court noted the claims against Hynes had "no merit from the outset." The court found it was "painfully obvious" plaintiffs knew it was not the function of a person as high on the "chain of command" as Hynes to both personally inspect the work done on the elevators and to account for materials received by the hospital. The court further observed:

> [T]here were others along the way who would approve invoices, et cetera. And [Hynes] **[*4]** would look to see if those people along the way down at the hospital, et cetera, had signed off on the work, which they had done, and then he signed off on their . . . paperwork.
> Dragging [Hynes] in [was] in fact a very despicable act on behalf of the County because there was no basis [to do so]. . . .
> [E]veryone knew what he had done and how he had done it, that he had signed a piece of paper that was submitted in accordance with the chain of authority that he had, that he looked at the paper and just signed it and that was . . . merely his function.

By order dated September 25, 2015, the court denied Hynes's request to similarly sanction appellant. Appellant appeals only the September 1, 2015 order.

II

On appeal, appellant's primary contention is the trial court erred when it ordered plaintiffs to pay Hynes's counsel fees and costs. Appellant argues the Authority's claims against Hynes were grounded in law and fact; therefore,

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[1] Two months after the second amended complaint was filed, the federal district court remanded this matter to the State court.

[2] The court subsequently supplemented its oral findings with a written opinion.

there was no justification for finding the Authority had prosecuted a frivolous claim against him. In its initial brief, appellant does not address whether it has standing to challenge the September 1, 2015 order.

Plaintiffs' and Hynes's principal argument in response **[*5]** is appellant lacks standing to appeal the September 1, 2015 order, because the order was entered against only plaintiffs, the sole parties aggrieved by the order. They further argue appellant cannot assert the rights of a third party and, as appellant was not harmed by the September 1, 2015 order, appellant cannot claim to be the real party in interest, see *Rule 4:26-1*.

Although the issue of its standing is an obvious and essential question, appellant makes no mention of this issue except in reply to plaintiffs' and Hynes's briefs. In its reply brief, appellant endeavors to show it has standing by revealing Hynes "took an adverse action" against Wolff as a result of the September 1, 2015 order. Appellant does not disclose the nature of the action, claiming the Rules of Court prohibit it from doing so, but asserts, without any explanation, that Hynes's action confers it with standing to challenge the September 1, 2015 order.

Another issue has surfaced. In its briefs before us, appellant takes the position it is the successor to the Wolff firm. In fact, a form of order appellant submitted to the court for its use after deciding Hynes's motion to sanction appellant states it was "formerly known as **[*6]** Wolff & Samson PC." Yet, during oral argument, appellant's counsel admitted he was unsure of the relationship between appellant and Wolff, and whether appellant is Wolff's successor. Counsel also advised that the Wolff firm has not yet dissolved.

If Wolff and appellant are separate and distinct entities, appellant may not represent Wolff, unless it does so as Wolff's counsel. Therefore, without question, the issue of standing is pivotal and one appellant should have addressed by filing a timely motion to intervene. "Whether a party has standing is 'a threshold justiciability determination . . . .'" *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., N.J. Super. , , 2018 N.J. Super. LEXIS 23, *18 (App. Div. 2018)* (quoting *In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85, 855 A.2d 582 (App. Div. 2004)*). "[A] lack of standing . . . precludes a court from entertaining any of the substantive issues for determination." *Ibid.* (alterations in original) (quoting *EnviroFinance Grp. v. Envtl. Barrier Co., 440 N.J. Super. 325, 339, 113 A.3d 775 (App. Div. 2015)*).

In general, to appeal from an order, one must be aggrieved by it. *Calabro v. Campbell Soup Co., 244 N.J. Super. 149, 169, 581 A.2d 1318 (App. Div. 1990)* (quoting *Howard Savings Inst. v. Peep, 34 N.J. 494, 499, 170 A.2d 39 (1961)*). In order to be aggrieved, "a party must have a personal or pecuniary interest or property right adversely affected by the judgment in question." *State v. A.L., 440 N.J. Super. 400, 418, 114 A.3d 365 (App. Div. 2015)* (quoting *Howard Sav. Inst., 34 N.J. at 499*).

The fact a party aggrieved by an order has not appealed from it does not necessarily preclude another party from doing so. "Our prior decisions have recognized **[*7]** the appropriateness of granting a party affected by a judgment leave to intervene to pursue an appeal if a party with a similar interest who actively litigated the case in the trial court has elected not to appeal." *CFG Health Sys., L.L.C. v. Cty. of Essex, 411 N.J. Super. 378, 385, 986 A.2d 695 (App. Div. 2010)*. Moreover, the right to appeal is not conditioned upon having participated as a party in the prior proceeding. *Exxon Mobil Corp., N.J. Super. , 2018 N.J. Super. LEXIS 23, *32*) (quoting *SMB Assocs. v. N.J. Dep't of Envtl. Prot., 264 N.J. Super. 38, 44, 624 A.2d 14 (App. Div. 1993)*).

Here, appellant has not identified how it is aggrieved by the September 1, 2015 order. More important, appellant did not avail itself of the remedy of filing a motion for leave to intervene, *see Rule 4:33-1* and *Rule 4:33-2*, so the question of its standing could have been properly reviewed and decided. Because the question of whether appellant has standing and is entitled to intervene remains unanswered, we are precluded from considering the substantive issues appellant asserts. *Exxon Mobil Corp., N.J. Super. , 2018 N.J. Super. LEXIS 23, *19*) (quoting *EnviroFinance, 440 N.J. Super. at 339*). Accordingly, the appeal is dismissed.

Dismissed.

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Powerhouse First, LLC v. Waldo Jersey City, LLC

Superior Court of New Jersey, Appellate Division

May 10, 2016, Argued; June 28, 2016, Decided

DOCKET NO. A-1609-12T4, A-0655-13T4, A-0656-13T4

Reporter
2016 N.J. Super. Unpub. LEXIS 1488 *

POWERHOUSE FIRST, LLC,[1] Plaintiff-Respondent, v. WALDO JERSEY CITY, LLC, and POWERHOUSE LAND DEVELOPMENT, LLC, Defendants, and DAVID PAZDEN, Defendant-Appellant, and MICHAEL PAZDEN, Third-Party Plaintiff-Appellant, and MICHELE PAZDEN, Third-Party Plaintiff, v. POWERHOUSE FIRST, LLC, Third-Party Defendant.POWERHOUSE FIRST, LLC, Plaintiff-Respondent, v. WALDO JERSEY CITY, LLC, POWERHOUSE LAND DEVELOPMENT, LLC, STATE OF NEW JERSEY, 99 MONTGOMERY STREET, LLC, MICHAEL PAZDEN, MICHELE PAZDEN, HACBM ARCHITECTS ENGINEERS, PLANNERS, LLC, BEN BIANCHI, WILLIAM BURNS, JR., WILLIAM BURNS, SR., WILLIAM LEE WAI CHOI, SCOTT CHUNG, KIM CLARK, PETER DUNCAN, KEITH GREENGROVE, POON KOON HEI, VINCENT HINDMAN, MARIUS JUNGERHANS, ROBERT JUNGERHANS, AKIRA KOSUGI, TONY LAGNESE, QI LI, MICHAEL MADIGAN, TODD NICE, CHRIS NTAWIHA, STEVE POGORELIC, CHRIS SUMMERS, KEIKO TAKAYAMA, JUDY TANG, SHENG-YUH TANG, STEVE VOSKANIAN, and JIMMY YUNG, Defendants, and DAVID PAZDEN, Defendant-Appellant.POWERHOUSE FIRST, LLC, Plaintiff-Respondent, v. WALDO JERSEY CITY, LLC, POWERHOUSE LAND DEVELOPMENT, LLC, DAVID PAZDEN, STATE OF NEW JERSEY, 99 MONTGOMERY STREET, LLC, MICHELE PAZDEN, HACBM ARCHITECTS ENGINEERS, PLANNERS, LLC, BEN BIANCHI, WILLIAM BURNS, JR., WILLIAM BURNS, SR., WILLIAM LEE WAI CHOI, SCOTT CHUNG, KIM CLARK, PETER DUNCAN, KEITH GREENGROVE, POON KOON HEI, VINCENT HINDMAN, MARIUS JUNGERHANS, ROBERT JUNGERHANS, AKIRA KOSUGI, TONY LAGNESE, QI LI, MICHAEL MADIGAN, TODD NICE, CHRIS NTAWIHA, STEVE POGORELIC, CHRIS SUMMERS, KEIKO TAKAYAMA, JUDY TANG, SHENG-YUH TANG, STEVE VOSKANIAN, and JIMMY YUNG, Defendants, and MICHAEL PAZDEN, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by *Powerhouse First, LLC v. Waldo Jersey City, LLC, 2017 N.J. LEXIS 46 (N.J., Jan. 17, 2017)*

Certification denied by *Powerhouse First, LLC v. Waldo Jersey City, LLC, 2017 N.J. LEXIS 43 (N.J., Jan. 17, 2017)*

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4672-09 and the Chancery Division, Hudson County, Docket No. F-44841-09.

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[1] Investors Savings Bank (Investors) assigned its foreclosure judgment to Mirador 77, which in turn assigned the judgment to Powerhouse First, LLC (Powerhouse First). Mirador allegedly breached its agreement to defend Investors in this appeal, and Powerhouse First reached a settlement of this appeal while it was pending. Consequently, by order dated December 11, 2014, we granted Investors' motion for leave to participate in the appeals and to rely, in the Law Division appeal, on a brief previously filed by Powerhouse First. Due to several substitutions of counsel and changes in the participating respondent party, multiple attorneys authored the respondent's briefs.

Investors Sav. Bank v. Waldo Jersey City, LLC, 418 N.J. Super. 149, 12 A.3d 264, 2011 N.J. Super. LEXIS 30 (App.Div., Feb. 17, 2011)

Core Terms

borrowers, counterclaims, loan agreement, mortgage, appellants', loan documents, breached, summary judgment, foreclosure, asserting, foreclosure action, foreclosure case, appeals, default, standing to assert, trial court, certif, funds, liens, commitment letter, loan commitment, guarantor, intervene, rights, summary judgment motion, foreclosure judgment, loan proceeds, reconsideration, lender's, orders

Counsel: David Pazden, appellant, argued the cause Pro se in Docket Nos. A-1609-12 and A-0655-13.

Michael Pazden, appellant, argued the cause Pro se in Docket Nos. A-1609-12 and A-0656-13.

Michael A. Saffer and Arla D. Cahill argued the cause for respondent Investors Savings Bank (Mandelbaum Salsburg, P.C., attorneys; Christine D. Petruzzell (Wilentz, Goldman & Spitzer), of counsel and on the brief in A-1609-12; Risa M. Chalfin, (Wilentz, Goldman & Spitzer), on the briefs in A-0655-13 and A-0656-13).

Bray & Bray, attorneys for respondent Powerhouse First, LLC (Peter R. Bray, on the brief in A-1609-12).

Judges: Before Judges Reisner, Leone and Whipple.

Opinion

PER CURIAM

We have consolidated three appeals for purposes of this opinion. In A-1609-12, David Pazden (David) and Michael Pazden (Michael) jointly filed a notice of appeal from an October 12, 2012 Law Division judgment in favor of Investors Savings Bank (the bank or Investors). In the Law Division action, Investors sought to collect payment on a multi-million-dollar commercial construction loan, which **[*2]** was issued to Waldo Jersey City (Waldo) and Powerhouse Land Development (PLD) (collectively, the corporate borrowers). Investors sued the corporate borrowers and David, who had personally guaranteed the loan.[2]

In A-0655-13 and A-0656-13, David and Michael, respectively, each filed a notice of appeal from the Chancery Division's August 30, 2013 final judgment of foreclosure, based on a mortgage that secured the construction loan. They also appeal from interlocutory orders dated February 2, 2012, denying Michael's intervention motion for failure **[*3]** to comply with the applicable Court Rules; June 15, 2012, granting summary judgment to plaintiff; and September 14, 2012, striking defendants' answers as non-contesting.

For the reasons that follow, we affirm in all three appeals.

I

It is helpful to begin with a brief overview of the parties and the litigation. David and his father Michael (collectively, appellants) were managing members of the corporate borrowers. David executed a personal guarantee promising to repay the loan in the event the corporate borrowers failed to do so. In violation of the loan agreement, Michael

[2] In a January 16, 2013 order we permitted David Pazden to file a notice of appeal on his own behalf, but stated that Waldo and Powerhouse could not appeal unless represented by counsel. In a March 18, 2013 order, we clarified the January 16, 2013 order to also permit Michael Pazden to appeal, as an individual, from the following orders: the April 16, 2010 order dismissing his individual third-party complaint; the January 6, 2012 order denying his motion to intervene as an individual litigant; and the February 3, 2012 order denying reconsideration. We noted that those orders were interlocutory, and the final judgment was entered on October 12, 2012.

placed subordinate liens against the mortgaged property. He also claimed an interest in the breach of contract and foreclosure actions based on a post-default assignment of rights from the corporate borrowers, which he obtained in violation of the loan documents which provided that any such assignment would be void.

The bank initiated the Law Division and foreclosure actions in 2009. In December 2011 and January 2012, counsel for the corporate borrowers withdrew from both actions, claiming that Michael was interfering with their representation of the corporate borrowers. After the corporations failed to obtain substitute **[*4]** counsel, the Law Division entered a default judgment against the corporate borrowers, and entered summary judgment against David on the basis that the corporate borrowers breached the terms of the loan. The Law Division dismissed Michael's claims for lack of standing and denied his motion to intervene.

The Chancery Division similarly entered judgment against the corporate borrowers. The Chancery judge gave the Law Division's breach of contract ruling preclusive effect, and found that David and Michael lacked standing to argue that the bank breached the contract with the corporate borrowers. On appeal, David and Michael challenge the Chancery Division's entry of a foreclosure judgment in the bank's favor, both courts' dismissals of their counterclaims, and the Law Division's damages judgment against David as guarantor.

II

Next, it is helpful to focus on the loan documents. On July 10, 2006, Investors issued a loan commitment letter to Waldo for a construction loan. David Pazden signed the letter on behalf of Waldo. In a section captioned "Commitment Expiration Date" the letter provided: "This loan commitment will expire in 75 days from the date of the issuance of this commitment letter **[*5]** if the loan is not closed prior to that date. Any extensions of the expiration date must be made in writing." Nothing in that paragraph committed Investor to close the loan within seventy-five days. There is no dispute that Investors extended the seventy-five-day deadline, and the loan closed in September 2007.

The commitment letter contained a "Restriction on Assignment" which stated: "Neither this Commitment nor the Loan proceeds shall be assignable by the borrower without the prior written consent of the Bank. *Any attempt at such assignment*, without such consent, *shall be void* and, at the Bank's option, be deemed a default." (emphasis added). The letter also contained a "Restriction on Transfer" which provided that the "sale, conveyance, transfer . . . directly or indirectly, of the Property or any interest therein, or the sale or transfer of an interest of Borrower (either of record or beneficially)" would permit Investors to "declare the Loan immediately due and payable."[3] In a section prohibiting "Additional Financing," the letter provided: "During the term of this Loan, the Borrower shall not obtain any additional financing or use of credit that would incur a lien on the Property **[*6]** or any other collateral related to the Property without the prior written consent of the Bank." This section contained a limited exception for a $700,000 second mortgage specifically permitted on page three of the letter.

The loan closed on September 14, 2007. The Loan Agreement, which David signed on behalf of Waldo, PLD, and himself as guarantor, specifically incorporated the commitment letter as one of the "Loan Documents" which, together, were to be "construed as one instrument." However, the Agreement provided that "[i]n the event of any inconsistencies between the terms of this Loan Agreement and the Loan Commitment, the terms of this Loan Agreement shall prevail." The Agreement also provided that "[t]he Loan Documents are enforceable in accordance with their terms against Borrower and Guarantor."

Like the commitment letter, the Loan Agreement prohibited the borrower, without the bank's consent, **[*7]** from assigning the Agreement; conveying, selling or encumbering the property; or changing the members of the borrower. Similarly, the Note provided that, absent the lender's consent, the following would be events of default: a change in the ownership of the mortgaged property, a change in the equity ownership of the borrower, or the placing of mortgages or other liens on the property.

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[3] Prior to the loan closing, Investors consented in writing to a modification to the restrictions on assignment and transfer, by specifically agreeing that the borrowing entity could be "a new LLC known as Powerhouse Land Development, LLC," all of whose members would be the same as those of Waldo.

By its terms, the Note, for which the mortgage was security, provided for interest-only payments until its maturity date of September 14, 2009. On that date, the loan became payable in full.

On August 21, 2009, Investors filed a foreclosure complaint against the corporate borrowers and David as the loan guarantor. The foreclosure complaint also named Michael and his daughter Michele as defendants, because they had placed liens on the mortgaged property. In 2011, while the foreclosure complaint was pending, Waldo transferred title to the property to Michael for one dollar, pursuant to an agreement that required him to hold the property in trust for himself, David, and Michele.

The Law Division complaint was filed against the corporate borrowers and David on September 22, 2009. At that point, the loan was **[*8]** due in full. It had not been paid off, and the undisputed facts of record establish that the corporate borrowers had committed numerous acts of default. The corporate borrowers and David filed an answer and counterclaim, asserting that Investors had breached the loan agreement and caused the borrowers to incur financial losses.

III

Before addressing the issues on this appeal, we briefly summarize some additional relevant procedural history. In *Investors Savings Bank v. Waldo, Jersey City, LLC, 418 N.J. Super. 149, 12 A.3d 264 (App. Div. 2011)*, we addressed the Law Division's April 16, 2010 interlocutory order dismissing, "at the pleading stage," the counterclaim filed by the corporate borrowers and David (here, defendants).[4] As previously noted, Investors had filed suit to collect on the balance of the construction loan, and defendants had filed a counterclaim asserting that plaintiff breached the loan agreement by "refusing to fully fund the loan." *Id. at 152*. The Law Division had dismissed the counterclaim based on language in the loan documents that the trial court interpreted as precluding defendants from asserting counterclaims in an action by Investors to collect on the loan, thus requiring defendants to assert their claims in a separate lawsuit. *Id. at 152-53*.

In our February 11, 2011 opinion, we held that such a provision was unenforceable, because it conflicted with our courts' rules of procedure, particularly the entire controversy doctrine. *Id. at 151*.[5] Consequently, we reversed the order dismissing the counterclaims, and remanded the case to the trial court for further proceedings. Our opinion did not address the merits of the counterclaims. Nor did our opinion address whether David had standing to assert the counterclaims.

Thereafter, by order dated January 6, 2012, the Law Division granted a motion by the corporate **[*10]** borrowers' attorney to be relieved as counsel. The court notified David and Michael that they could not represent the corporations and gave the corporations thirty days to retain new counsel. The January 6, 2012 order also denied Michael's motion to intervene in the lawsuit. In an oral opinion placed on the record on January 6, the motion judge stated that Michael's intervention motion was untimely because the case was already scheduled for trial. He also reasoned that Michael lacked standing to intervene.

On January 17, 2012, Michael and David, acting pro se, filed a motion for reconsideration of what they characterized as the order dismissing "their Counterclaims and [T]hird Party Complaint." The Law Division denied the reconsideration motion by order dated February 3, 2012. However, Michael and David have not provided us

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[4] In the same April 16, 2010 order dismissing **[*9]** the counterclaims, the Law Division dismissed a third party complaint filed by Michael and Michele. The Law Division found that they had no standing to assert claims on behalf of Waldo and otherwise had no legal interest in the loan or its alleged breach. Michael and Michele did not move for leave to appeal from that order, and our opinion in *Investors* did not address it. Michael's current appeal includes the April 16, 2010 order.

[5] Our opinion distinguished, and did not address, counterclaims in foreclosure actions, noting that the Court Rules specifically limit the types of counterclaims that can be asserted in a foreclosure case. *Id. at 157 n. 4*; *see R. 4:64-5*.

with the transcript of the motion hearing or the judge's opinion on the motion, and hence, they have not properly perfected their appeal with respect to the February 3, 2012 order.[6]

IV

Against that procedural backdrop, we address the appeal from the Law Division order granting summary judgment. David, appearing pro se, filed opposition to Investor's summary judgment motion, and cross-moved for summary judgment. However, the corporate borrowers did not retain new counsel and did not file opposition to Investors' motion. On February 17, 2012, the Law Division judge granted Investors' unopposed summary judgment motion against the corporations. On February 27, 2012, the judge granted summary judgment against David, and denied David's cross-motion for summary judgment.

In his February 27, 2012 oral opinion, the trial judge found that David did not deny that the corporate borrowers breached the loan agreement. Instead, David claimed that the agreement was not binding on the borrowers because Investors breached the agreement. **[*12]** The judge found that David's assertions were not supported by the record and that Investors was entitled to summary judgment. In denying David's cross-motion, the judge also found that David's proposed counterclaims against Investors mirrored his defenses to Investors' summary judgment motion and were meritless for the same reasons.[7]

As David and Michael advised us at oral argument, their appeals hinge upon their central claim that Investors breached the loan agreement. As the loan guarantor, David has standing to assert defenses that would be available to the corporate borrowers whose loan he guaranteed. *See Lopresti v. Wells Fargo Bank, N.A., 435 N.J. Super. 311, 319, 88 A.3d 944 (App. Div.), certif. denied, 219 N.J. 629, 99 A.3d 833 (2014).*

On the other hand, because Michael was neither a loan guarantor nor a party to the loan, he has no standing to assert the claim. His status as a shareholder of the corporate borrowers does not confer standing. *See Strasenburgh v. Straubmuller, 146 N.J. 527, 550, 683 A.2d 818 (1996); Pepe v. Gen. Motors Accept. Corp., 254 N.J. Super. 662, 666, 604 A.2d 194 (App. Div.), certif. denied* ***[*13]*** *, 130 N.J. 11, 611 A.2d 650 (1992).* The loan documents, to which the corporate borrowers agreed, provided that a purported assignment of a right to the loan commitment or to the loan proceeds shall be void. *See Owen v. CNA Ins., 167 N.J. 450, 467-68, 771 A.2d 1208 (2001).* Consequently, Michael cannot rely on assignments from the corporate borrowers, which he claims give him rights under the loan documents.[8]

We agree with the trial judge that Michael's procedural maneuvers were also a transparent attempt to circumvent *Rule 1:21-1(c)*, requiring that a corporation be represented by counsel. As the judge observed in denying Michael's motion on January 6, 2012, there was no need for Michael to intervene in the litigation, pro se, on Waldo's behalf. Rather, Waldo needed to hire another attorney.

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[6] It is unclear whether the January 17, 2012 motion sought reconsideration of the January 6, 2012 order or some other order. We also note that the January 17, 2012 motion was accompanied by Michael's **[*11]** certification, asserting various interests he claimed in the litigation, including a power of attorney for David, who he claimed was mentally incapacitated. A power of attorney does not authorize a non-attorney to provide legal representation to another person. *R. 1:21-1(a)*; Committee on the Unauthorized Practice of Law-Opinion 50, 211 N.J.L.J. 866 (2013); *see also Kasharian v. Wilentz, 93 N.J. Super. 479, 482, 226 A.2d 437 (App. Div.), certif. denied,* ***48 N.J. 447, 226 A.2d 434 (1967).***

[7] In later denying David's motion for reconsideration, on October 12, 2012, the judge reiterated, in a written statement of reasons, that he had addressed the counterclaims in deciding the summary judgment motion. Consequently, appellants' argument - that the trial court acted in derogation of our opinion in *Investors* - is without merit.

[8] The January 1, 2009 assignment document, which David signed on behalf of Waldo, purported to assign to Michael Waldo's "rights under its Agreements with Investors Savings Bank."

We also find no abuse of the trial court's discretion in finding that Michael's intervention motion was untimely, because it was filed in December 2011, shortly before the scheduled trial date. Both Rule 4:33-1 (intervention as of right) and Rule 4:33-2 (permissive intervention) require a "timely application."

Lastly, Michael's status as a defendant in **[*14]** the foreclosure case did not confer standing in the Law Division action. Michael was named as a defendant in the foreclosure case because he had placed liens on the property. Those liens were not related to the loan documents, and his mere status as a lienholder did not confer on him a legally enforceable interest in the loan contract between Investors and the corporate borrowers. *See* EnviroFinance Group, LLC v. Envt'l Barrier Co., 440 N.J. Super. 325, 341-42, 113 A.3d 775 (App. Div. 2015).

Nonetheless, as set forth below, even if we consider Michael's arguments on the merits of the summary judgment motion, which are the same arguments David asserts, those arguments are entirely without merit.

Our review of a summary judgment order is de novo, employing the same *Brill*[9] standard used by the trial court. Davis v. Brickman Landscaping, 219 N.J. 395, 405, 98 A.3d 1173 (2014) (citation omitted). Having reviewed the summary judgment record de novo, we find that the Law Division properly rejected David's defenses on summary judgment. The loan documents, together with all other undisputed evidence, establishes that Investors did not breach the loan agreement. Consequently, summary judgment was properly granted in favor of Investors in the Law Division action. We affirm on this issue substantially for the reasons stated by the motion judge in his thorough oral opinion **[*15]** issued on February 27, 2012. We add these comments.

Appellants' arguments rest heavily on the flawed premise that the loan commitment obligated Investors to close the loan within seventy-five days. They claim that Investors breached that obligation and thereby delayed the construction project. As previously noted, nothing in the loan commitment created such an obligation. To the contrary, the plain wording of the document simply provided that if the loan did not close within seventy-five days, the commitment would expire, unless Investors agreed to extend it. The other clauses on which appellants rely are equally unavailing. Those clauses, including the commitment being "subject to Investors . . . securing Participating Lenders" and securing "a plan and cost review by its construction engineer," were included for the lender's protection, and were not subject to any contractual deadline.

Further, when the corporate borrowers and David closed on the loan, a year after signing the commitment letter, they made no claim that Investors had breached the commitment letter, and they did not sign the loan agreement under protest or with any reservation of rights. "Where a party fails to declare **[*16]** a breach of contract, and continues to perform under the contract after learning of the breach, it may be deemed to have acquiesced in an alteration of the terms of the contract, thereby barring its enforcement." Garden State Bldgs., L.P. v. First Fid. Bank, N.A., 305 N.J. Super. 510, 524, 702 A.2d 1315 (App Div. 1997), *certif. denied*, 153 N.J. 50, 707 A.2d 153 (1998) (citing Ballantyne House Assocs. v. City of Newark, 269 N.J. Super. 322, 334, 635 A.2d 551 (App. Div. 1993)); *see* Frank Stamato & Co. v. Lodi, 4 N.J. 14, 21, 71 A.2d 336 (1950) (Where a party chooses to continue to perform, following the other party's breach, he cannot later use the prior breach as "any excuse for ceasing performance on his own part." (quoting 5 *Williston on Contracts* (Rev. Ed.) 3749)).

Appellants contend that Investors wrongfully insisted that an existing $700,000 mortgage be paid off from the loan proceeds. However, the corporate borrowers signed the loan agreement and closed, knowing that Investors was requiring them to pay off the mortgage. *See* Garden State, supra, 305 N.J. Super. at 524. More importantly, appellants' brief cites to a record document memorializing the fact that Investors required a pay-off of the loan because the holder of the $700,000 mortgage refused to subordinate it to the Investors mortgage. Unless subordinated, it would not have been a "second" mortgage, and thus would not be permitted by the loan agreement.

David and Michael also claim that Investors failed to advance funds to which Investors was entitled under the **[*17]** loan agreement, and eventually stopped funding the loan altogether in October 2008. They claim that failure to extend loan proceeds for "soft costs" such as architectural drawings, real estate taxes, insurance premiums and

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[9] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540-41, 666 A.2d 146 (1995).

other expenses, impaired their ability to obtain building permits and proceed with the project and therefore was a material breach by Investors. They also claim that Investors failed to fund the entire amount of $2,300,000 for an interest reserve, and wrongfully charged a default interest rate while money still remained in the interest reserve. They contend that those breaches of the loan agreement caused the corporate borrowers to have to expend their own funds to cover soft costs, and justified the corporate borrowers in ceasing to perform their obligations under the agreement.

In support of that claim they cite to a series of letters which Michael sent to Investors over a several month period in 2008 and 2009. However, they do not cite to any legally competent evidence in the record which would demonstrate the accuracy of the self-serving statements contained in his letters.[10]

More importantly, the evidentiary record reflects that the amounts Investors advanced for the soft costs and the interest reserve were consistent with the detailed "INITIAL BUDGET ALLOCATION" that was attached to the loan agreement. The document, which David signed on behalf of Waldo on September 14, 2007, specifically states that the borrowers "agree to the budget attached hereto and made a part hereof, which shall be applicable prior to the availability of any construction advances, for the construction project." The attached budget document was captioned "initial project advances prior to construction start." Investors later agreed to increase the pre-construction interest reserve to about $513,000. It is undisputed that construction never commenced. Appellants do not deny that Investors advanced the funds set forth in the budget, and they provide **[*19]** no explanation as to why Investors was obligated to pay anything more than the amounts the bank agreed to advance.

Appellants also argue in general terms that (in their words) "technical defaults" by the corporate borrowers would not necessarily justify Investors in ceasing to release loan funds. However, they do not support those bald assertions with any specifics, and their arguments are without sufficient merit to warrant further discussion. *R. 2:11-3(e)(1)(E)*.

Appellants' argument that discovery was incomplete is without merit for the reasons stated by the trial court on October 21, 2011. The identities of the participating lenders was irrelevant to the lawsuit. The participation agreement between Investors and the participating lenders gave Investors the exclusive right to enforce the loan documents and to administer and service the loan. The participation agreement specifically provided that no provisions of the agreement were for the benefit of the borrowers. We agree with the trial court that defendants' discovery demands were "a fishing expedition," and their motions aimed at obtaining that discovery were properly denied. Their appellate arguments on this point do not warrant further discussion. **[*20]** *R. 2:11-3(e)(1)(E)*.

Appellants' additional arguments on the summary judgment issue are either based on misreading of the loan documents, are not supported by their citations to the record, or are otherwise without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.[11]

Appellants' further arguments on the Law Division appeal are without merit and, except as addressed herein, they do not warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*. They challenge the award of interest at the default rate, asserting that it was not demanded in the complaint. We disagree. The complaint demanded interest pursuant to the loan agreement, and the agreement provided for an additional five percent interest in case of a default.

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[10] In the statement of facts section of their brief, appellants improperly incorporate by reference **[*18]** the statement of material facts which they filed in the trial court. It is not this court's obligation to sift through the appendix to find pertinent facts that might support appellants' arguments. It is their obligation to provide us with specific record citations to support their factual and legal contentions. *R. 2:6-2(a)(4)*; *see Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 474-75, 955 A.2d 304 (App. Div. 2008), certif. denied, **197 N.J. 476, 963 A.2d 845 (2009)***.

[11] In light of our disposition of this appeal, we do not address Investors' claim that David's discharge in bankruptcy renders moot his appeal of the Law Division judgment and estops him from asserting his counterclaims because he allegedly failed to disclose those claims in the bankruptcy filing. Nor do we address whether David may file an application in the Law Division to discharge the judgment against him pursuant to *N.J.S.A. 2A:16-49.1*. That issue is not before us.

Contrary to appellants' argument, Investors properly **[*21]** funded the interest reserve and was not required to advance additional funds until construction commenced.

We reject appellants' challenge to the counsel fee award. Because a commercial loan was involved, Investors was not limited to foreclosure as its remedy for non-payment, and it was not required to foreclose on the mortgage before filing an action on the note in the Law Division. N.J.S.A. 2A:50-2.3; First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 351, 921 A.2d 417 (2007). Appellants rely on Regency Savings Bank v. Morristown Mews, L.P., 363 N.J. Super. 363, 833 A.2d 77 (App. Div. 2003). In that case, the bank pursued a foreclosure action, and filed a separate Law Division action solely for the purpose of collecting additional counsel fees, beyond those allowed in the foreclosure action. Id. at 370.

Regency Savings is not on point here. The Law Division action was not filed merely as a pretext to circumvent the limits set on counsel fee awards in foreclosure cases. The action on the note was hard-fought and drawn out, primarily due to appellants' procedural machinations, and it went to judgment long before the foreclosure case was decided. Further, unlike Regency Savings, appellants point to no record evidence that the foreclosure action was likely to result in full satisfaction of "the principal and interest owed." Id. at 368-69. We therefore reject appellants' argument that the Law Division **[*22]** should have limited the counsel fee award to the amounts permitted in a foreclosure case. See R. 4:42-9(a)(4).

As previously noted, appellants' additional appellate arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm the Law Division orders on appeal.

V

Turning to the foreclosure appeals, we conclude that the appeals from the final foreclosure judgment are moot. Michael and David reached a settlement with the current holder of the foreclosure judgment, Powerhouse First, LLC (Powerhouse First), and they filed a Stipulation of Dismissal of their appeal with respect to Powerhouse First.[12] The stipulation dismissing the appeal against Powerhouse First, the current holder of the final foreclosure judgment, renders moot the appeal of that judgment. However, a settlement with Powerhouse First cannot vitiate prior orders entered in favor of Investors dismissing counterclaims appellants sought to assert against Investors. Hence, we address appellants' appeals insofar as they challenge the dismissal of the counterclaims for affirmative relief, which they asserted against Investors in the foreclosure case.

Pursuant to Rule 4:64-5, only germane counterclaims may be asserted in a foreclosure case. Germane counterclaims are those claims that would serve to defeat the plaintiff's right to foreclose on the mortgage, including claims that the plaintiff "breached the underlying agreement in relation to which the mortgage was executed." Leisure Technology-Northeast, Inc., v. Klingbeil Holding Co., 137 N.J. Super. 353, 358, 349 A.2d 96 (App. Div. 1975); Sun NLF Ltd. P'ship v. Sasso, 313 N.J. Super. 546, 550-51, 713 A.2d 538 (App. Div.), certif. denied, 156 N.J. 424, 719 A.2d 1023 (1998). In this case, the foreclosure counterclaims were germane, because if Investors breached the loan contract, and if that breach justified the mortgagor's failure to pay the mortgage, Investors might have no right to foreclose.

However, the foreclosure counterclaims were the same claims that the Law Division had earlier dismissed on summary judgment. We agree with the Chancery **[*24]** judge that, by virtue of the Law Division order granting summary judgment dismissing the counterclaims, David was barred by collateral estoppel from asserting those same claims in the foreclosure action. See First Union Nat. Bank, supra, 190 N.J. at 352-54.

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[12] As previously noted, by order dated December 11, 2014, Investors **[*23]** obtained our permission to continue to appear in this appeal, in order to defend against appellants' continuing assertion of their counterclaims against Investors. In an apparent attempt to circumvent our order, on the eve of oral argument, appellants filed three motions with this court (M-006446-15, M-006447-15, and M-006448-15) to bar Investors from participating in the argument, and for related relief. We denied those motions in part, and we now deny the motions in their entirety.

For the reasons stated by the Chancery judge, Michael had no standing to assert those counterclaims, because he was not a party to the loan documents. In violation of the loan documents, the corporate borrowers allowed Michael to place liens and a mortgage on the property, and eventually transferred the property to him. Michael's status as a junior lienor and subsequent title owner of the property required that Investors name him as a defendant in the foreclosure action, in order to terminate his interest in the property. *See Highland Lakes Country Club v. Franzino, 186 N.J. 99, 113, 892 A.2d 646 (2006)*. However, neither his liens nor his purported ownership of the property gave Michael standing to assert damage claims against Investors based on its alleged violations of the loan documents.[13] As previously noted, the loan documents also specified that any assignment of rights to the loan proceeds would be void. Nonetheless, even if Michael had standing, the counterclaims were plainly without merit, as we concluded in our discussion of the Law Division appeal. **[*25]**

Appellants' additional arguments in the foreclosure appeals are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

To summarize, appellants' contentions that Investors breached the loan agreement, whether asserted as counterclaims for money damages or as defenses to Investors' Law Division and foreclosure complaints, were patently without merit and the pleadings based on those claims were properly dismissed. Accordingly we affirm in both the Law Division and Chancery appeals.

Affirmed.

End of Document

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[13] Nor did Michael's status as a lienholder or property owner give him standing to assert breaches of the corporate borrowers' contractual rights as a defense to the foreclosure of his interests. *See EnviroFinance Group, supra, 440 N.J. Super. at 341-42*. Of course, that defense would be moot in any event, since the underlying foreclosure judgment has been settled. For completeness, we also note that the Chancery judge did not abuse his discretion on February 2, 2012, when he denied Michael's request to "intervene" in the foreclosure action. Michael admitted on the record that he had failed to comply with any of the Court Rules governing such an application.

Panaccione v. Holowiak

Superior Court of New Jersey, Appellate Division

October 8, 2008, Argued; November 12, 2008, Decided

DOCKET NO. A-5461-06T3

Reporter
2008 N.J. Super. Unpub. LEXIS 1809 *; 2008 WL 4876577

NICHOLAS PANACCIONE and CINDY PANACCIONE, Plaintiffs-Appellants, v. PIOTR HOLOWIAK and NORTHEAST STUCCO SYSTEMS, INC., Defendants-Respondents, and TOWNSHIP OF OLD BRIDGE and PLANNING BOARD OF OLD BRIDGE, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-10236-06.

Core Terms

plaintiffs', parties, wetlands, representations, nuisance, violations, parol evidence rule, misrepresentation, regulation, SELLER, notice, rights, consumer fraud, trial court, ENVIRONMENTAL, inaction, notice requirements, subdivision plan, public nuisance, sale contract, circumstances, restoration, injunction, ordinance, Township, releases, refers, lease

Counsel: Richard D. Schibell argued the cause for appellants (Schibell, Mennie & Kentos, LLC, attorneys; Mr. Schibell, of counsel; Lisa C. Krenkel, on the brief).

Willard C. Shih argued the cause for respondents (Wilentz, Goldman & Spitzer, P.A., attorneys; Mr. Shih and Michael J. Weisslitz, of counsel and on the brief).

Judges: Before Judges Parrillo, Lihotz and Messano.

Opinion

PER CURIAM

Plaintiffs Nicholas and Cindy Panaccione appeal from the May 11, 2007 summary judgment dismissal of their Law Division complaint in favor of defendants Piotr Holowiak (defendant), Northeast Stucco Systems, Inc. (NSS), the Township of Old Bridge (Old Bridge) and the Planning Board of Old Bridge (Board). We affirm.

By way of background, defendant owned a 6.835-acre tract of residentially-zoned property on East Greystone Road in Old Bridge, and lived in a home situated in the middle of the property. The property was protected by the New Jersey Freshwater Wetlands Protection Act (FWPA), *N.J.S.A. 13:9B-1 to -30*. In 1997, the New Jersey Department of Environmental Protection (DEP) cited defendant for violations of the FWPA, which **[*2]** defendant claims were the result of tree removal and clearing activities on his undivided lot. Defendant submitted a restoration plan in response to the violations, and on December 19, 1997, the DEP approved a revised version of the plan. Six months

later, on June 30, 1998, the DEP issued a letter advising defendant that it had "inspected the freshwater wetland restoration area and found it to be acceptable and reasonably in accordance with the approved restoration plan."

In November 1999, defendant submitted a land development application to Old Bridge seeking subdivision of the undivided property into three separate lots. The application specifically sought approval to create two additional building lots (Lots 60.11 and 60.13) on each side of defendant's current house (Lot 60.12). On August 6, 2002, the Board adopted a resolution specifically recognizing defendant's intent to develop the two new lots and approving his plan subject to several conditions. On October 3, 2002, the DEP approved defendant's application and issued a Statewide General Permit and Transition Area Waiver Averaging Plan Authorization.

After obtaining subdivision approval in 2002, defendant decided to sell his **[*3]** residence. Plaintiffs agreed to purchase Lot 60.12 from defendant for $ 935,000, and on August 3, 2005, the parties entered into a contract for sale. The contract contained an "as is" provision and an integration clause, specifically reciting that plaintiffs were not relying upon any representation of defendant or NSS outside those within the four corners of the contract. On August 11, 2005, plaintiffs' counsel confirmed that the contract was acceptable without modifications and the parties proceeded to closing.

Prior to closing, defendant, who was in Poland at the time, transferred the property in question (Lot 60.12) to NSS, of which he was the president and sole owner. At the October 28, 2005 closing, NSS conveyed the property to plaintiffs via a bargain and sale deed. The deed expressly refers to the subdivision plan, reciting: "[d]eed description refers to map entitled 'Proposed Minor Subdivision prepared for Piotr Holowiak of Lot 60 . . . ." Also at closing, the parties executed a release in which they waived "any and all claims" and rights against the other.

This much appears undisputed. The parties differ, however, over what if anything had been represented orally prior to the **[*4]** contract's closing. According to Nicholas Panaccione, defendant told him that the bookend lots were undevelopable and that he had no plans to develop them. Defendant denies making any such representation and in fact insists that he never met plaintiffs prior to signing the contract. Moreover, Grzegorz Kochan, vice president of NSS, certified that after closing, plaintiffs advised him that if defendant decided not to build on Lots 60.11 or 60.13, they would be interested in purchasing them.

In any event, based on their version, on December 22, 2006, plaintiffs filed a multi-count complaint against defendant, NSS, the Township and the Board, alleging common law and statutory consumer fraud, nuisance, and tortious interference with their enjoyment of the property. [1] In addition, or as an alternative to damages, plaintiffs' sought to void the Board's July 2, 2002 subdivision approval, which they contended was without knowledge of defendant's wetlands violations, and ultimately to enjoin defendant from developing the two parcels he still owned adjacent to their property. To that end, on January 29, 2007, plaintiffs moved for a preliminary injunction and leave to file a lis pendens. In response, **[*5]** on February 14, 2007, defendant filed a motion to dismiss plaintiffs' complaint with prejudice. In their opposition, plaintiffs, contending that defendant was still in violation of the FWPA, for the first time sought enforcement through the Environmental Rights Act (ERA), *N.J.S.A. 2A:35A-1 to -14*.

Treating the dismissal motion as one for summary judgment because materials beyond the complaint were presented, [2] the judge granted defendants the relief requested and denied plaintiffs' motions for a preliminary injunction and lis pendens. In so ruling, the judge specifically found that: plaintiffs failed to properly plead the ERA claim; both the contract and the general release barred plaintiffs' fraud-related claims; evidence supporting their

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[1] One of the counts pled a Conscientious Employee Protection Act (CEPA) (*N.J.S.A. 34:19-1 to -14*) violation, which plaintiffs later acknowledged as inadvertent and voluntarily agreed to dismiss.

[2] After filing their lawsuit, plaintiffs retained the services of Dr. Raymond Walker, a consultant specializing in environmental engineering, who then inspected defendant's property. On March 22, 2007, Walker reported his findings to the DEP, namely that the agency did not detect the full extent of the unauthorized filling of wetlands on defendant's property when it issued the notice of violation to defendant in 1996; that additional violations occurred after the DEP instituted its enforcement action, which remain unaccounted for to date; and that defendant did not comply with his obligations under the December 1997 DEP-approved restoration plan.

fraud claims was barred by the parol evidence rule; the Consumer Fraud Act [3] **[*6]** was inapplicable; their nuisance claim was meritless; their challenge to the subdivision plan was time-barred; and they were not entitled to injunctive relief under the circumstances.

On appeal, plaintiffs raise the following issues for our consideration:

I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT PERMITTING AMENDMENT OF PLAINTIFFS' PLEADINGS TO INCLUDE THE ENVIRONMENTAL RIGHTS ACT ("ERA") AND IN NOT FINDING THAT PLAINTIFFS' PLEADINGS HAD ALLEGED THE ERA.

II. THE ENVIRONMENTAL RIGHTS ACT VESTS IN YOUR PLAINTIFFS AND **[*7]** THE TRIAL COURT THE RIGHT TO PROSECUTE TO CONCLUSION THE AVERRED VIOLATION OF *N.J.A.C. §7:7A-14.5* AND ITS DEFERENCE TO THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION WAS NOT STATUTORILY REQUIRED UNDER THE WITHIN CICRUMSTANCES.

III. PLAINTIFFS HAVE THE INDEPENDENT RIGHT TO PURSUE THEIR CLAIMS REGARDLESS OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL'S INACTION, REMEDIES FOR ENVIRONMENTAL DESECRATION UNDER THE ERA UNDER THE WITHIN CIRCUMSTANCES.

IV. UNDER THE WITHIN CIRCUMSTANCES, THE PAROL EVIDENCE RULE DID NOT BAR EVIDENCE OF FRAUDULENT CONDUCT BY DEFENDANTS, NOR DID THE RELEASE EXECUTED BY PLAINTIFFS ANCILLARY TO CLOSING PRECLUDE THE RELIEF SOUGHT.

V. PLAINTIFFS' EXECUTION OF A RELEASE AT TIME OF CLOSING BY VIRTURE OF DEFENDANTS' FRAUDULENT CONDUCT DOES NOT BAR PLAINTIFF'S CLAIMS DIRECTLY OR COLLATERALLY AS IT RELATES TO THE CONTIGUOUS PARCELS NOT ENCOMPASSED THEREIN.

VI. THE CORPORATE DEFENDANT NORTHEAST STUCCO SYSTEMS, INC. IS SUBJECT TO THE NEW JERSEY CONSUMER FRAUD ACT AS A COMMERCIAL SELLER OF REAL ESTATE.

VII. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT PREMATURELY BY MAKING FACTUAL AND LEGAL CONCLUSIONS WITHOUT GIVING APPROPRIATE DEFERENCE TO THE REQUISITE INFERENCES **[*8]** AT THE TIME OF HEARING.

VIII. THE CONDUCT AVERRED BY THE PLAINTIFFS IN THE DESTRUCTION OF WETLANDS CONSTITUTES A PUBLIC AND PRIVATE NUISANCE.

IX. PLAINTIFFS, IN THEIR CHALLENGE TO THE WITHIN SUBDIVISION GRANT, ARE NOT BARRED BY THE FORTY-FIVE (45) DAY RULE.

X. THE COURT ERRED IN FINDING THAT THE AWARD OF MONETARY DAMAGES WOULD SUFFICE SHOULD PLAINTIFFS HAVE PREVAILED; A LIS PENDENS AND PRELIMINARY INJUNCTION SHOULD HAVE BEEN ISSUED.

We address these issues in the order raised.

(A)

During oral argument, plaintiffs raised an ERA claim not specifically or expressly pled in their complaint. The trial court noted at the time:

> I don't see in your pleadings an assertion of the [ERA]. I see that that was first raised in your papers filed on April 19th . . . . but you didn't assert the [ERA]. It's not asserted anywhere in the pleading . . . [and] you are supposed to assert that in the complaint so the D.E.P. is on notice and the State . . . is made a party. That's one of the statutory requirements for invocation. . . . So while I note you raise it, it's really not before the Court . . . . Certainly to use such a statutory remedy you would have had to comply with the entirety of this statute . . . **[*9]** .

Consequently, the motion judge dismissed plaintiffs' so-called ERA claim because it was not pled in their complaint, failed to comply with the ERA's mandatory pre-suit notice requirement, and was, in any event, substantively deficient.

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[3] *N.J.S.A. 56:8-1 to -184*.

On appeal, plaintiffs contend that a "fair reading of the complaint," including its "verbiage" about wetlands destruction/alteration [4] was sufficient to invoke the ERA and that the requisite notice to the DEP was provided by Dr. Walker's correspondence. We disagree.

The ERA enables private citizens to pursue their own enforcement proceedings in circumstances where the DEP fails to do so, providing in pertinent part:

> Any person may commence a civil action . . . against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance . . . . The action may **[*11]** be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.
>
> [*N.J.S.A. 2A:35A-4a*.]

The ERA, however, does not confer any substantive rights directly. *Mayor & Council of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1054 (D.N.J. 1993)* (citing *Superior Air Prods. v. NI Indus., 216 N.J. Super. 46, 58, 522 A.2d 1025 (1987)*, *appeal dismissed, 126 N.J. 308, 598 A.2d 872 (1991))*. Rather, it grants private plaintiffs standing to enforce other New Jersey environmental statutes "as an alternative to inaction by the government which retains primary prosecutorial responsibility." *Superior Air Prods., supra, 216 N.J. Super. at 58*.

There are two significant limitations to this statutory "procedural" remedy. First, it does not enable a citizen to compel performance of a discretionary function. *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chem. Co., 216 N.J. Super. 166, 174, 523 A.2d 250 (App. Div. 1987)*. The government is "entrusted initially with the right to determine the primary course of action to be taken." *Rockaway, supra, 811 F. Supp. at 1054* (quoting *Twp. of Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 95, 504 A.2d 19 (App. Div. 1986))*. **[*12]** Private citizens only have the right of enforcement under the ERA when "the state agency has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted[.]" *Morris County Transfer Station, Inc. v. Frank's Sanitation Serv., Inc., 260 N.J. Super. 570, 577-78, 617 A.2d 291 (1992)* (quoting *Twp. of Howell, supra, 207 N.J. Super. at 96*) (finding a three-year delay in addressing an ongoing Solid Waste Management Act violation constituted inaction that enabled a private citizen to bring an ERA claim). Second, the ERA is only available to

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[4] Plaintiffs base their "verbiage" argument on a number of allegations raised in their complaint

[FIRST COUNT]

> 12. More particularly, . . . the referenced subdivision application/purported grant contained inaccurate delineations of wetlands on the property, thus falsely inducing the Planning Board of the Township of Old Bridge to issue certain variances ancillary to grant of subdivision aforesaid.
>
> 13. Moreover, the wetlands/wetlands transition areas on the contiguous parcels aforesaid, upon information and belief, were disturbed without N.J.D.E.P. consent entailing, amongst other activities, the unauthorized clearing, filling and grading of the said premises.
>
> 14. Moreover, pursuant to obtaining **[*10]** state regulations/statute and the nominally named defendant Township's land use element of its Master Plan, the within defendants, Holowiak/Northeast Stucco Systems, Inc., did not continue to maintain an appropriate conservation easement following the location of fresh water wetlands and wetlands buffers as a condition precedent subsequent to the minor subdivision grant aforesaid.
>
> . . . .

[THIRD COUNT]

> 2. The activities of the within defendants, Holowiak and Northeast Stucco Systems, Inc. . . . in the aggregate were calculated to violate the regulations, statutes and ordinances obtaining in such instances made and provided on a municipal, county and state-wide level.

prevent future violations; it cannot be used to seek redress for past ones. N.J.S.A. 2A:35A-4 ("The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.").

Here, the particular environmental statute plaintiffs seek to enforce through the ERA is the FWPA. The FWPA, in turn, vests the DEP with the authority to enforce its provisions and terminate any permits issued. N.J.S.A. 13:9B-20, -21; N.J.A.C. 7:7A-14.5. In fact, courts have routinely deferred **[*13]** to the DEP in FWPA cases. *See* East Cape May Assocs. v. State, Dept. of Envtl. Prot., 343 N.J. Super. 110, 131-32, 777 A.2d 1015 (App. Div.), *certif. denied and appeal dismissed, 170 N.J. 211, 785 A.2d 439 (2001).*

Because private enforcement of environmental laws through the ERA hinges on agency inaction, the ERA contains mandatory pre-suit notice requirements:

> No action may be commenced pursuant to this act unless the person seeking to commence such suit shall, at least 30 days prior to the commencement thereof, direct a written notice of such intention by certified mail, to the Attorney General, the Department of Environmental Protection, . . . and to the intended defendant; provided, however, that if the plaintiff in an action brought in accordance with the "N.J. Court Rules, 1969," can show that immediate and irreparable damage will probably result, the court may waive the foregoing requirement of notice.
>
> [N.J.S.A. 2A:35A-11.]

Summary judgment is appropriate when a plaintiff fails to comply with this mandatory condition precedent. *See* Player v. Motiva Enters., LLC, 240 Fed. Appx. 513, 524 (3d Cir. 2007); *See also* Twp. of Howell, supra, 207 N.J. Super. at 95 (recognizing Legislature designed notice requirement to **[*14]** allow agencies to exercise value judgments such as whether to join the case, whether its expertise will assist the court, and whether state interests would be sacrificed to personal interests by the instigators of the suit).

Indisputably here, plaintiffs have failed to comply with this requirement. They did not mail notice to the DEP or the Attorney General of New Jersey announcing their intent to bring suit under the ERA. Nor did Dr. Walker's post-filing correspondence to the DEP suffice. Not only was it untimely, but it failed as well to notify the DEP that plaintiffs intended to pursue an enforcement action. Nor have plaintiffs demonstrated any immediate irreparable damage resulting from failure to waive the notice requirement.

Besides failing to provide the requisite notice, plaintiffs' complaint does not suggest - much less plead - an ERA claim. The complaint refers neither to the ERA nor the environmental statute - the FWPA - plaintiffs seek to enforce through the ERA. At best, plaintiffs allude to non-specified violations of state and local statutes in Count Three, which they voluntarily dismissed in any event. Indeed, a "fair reading" of the complaint's fraud, misrepresentation, **[*15]** nuisance, tortious interference and property delineation dispute counts fails to suggest, or even hint at, plaintiffs' interest to enforce another environmental statute against defendant. And finally, nowhere do plaintiffs assert governmental inaction, a necessary prerequisite to an ERA claim. [5]

Significantly, as to the latter, the motion judge found that the DEP in this instance retained exclusive jurisdiction to investigate defendant's alleged FWPA violations and to enforce the Act:

> [A]s I understand it, plaintiffs are arguing that because there was purported fraud on the [DEP] that this Court is vested with jurisdiction to address what may have been a misrepresentation by defendants at the time the wetlands restoration was approved.
>
> Plaintiffs are relying on the *New Jersey Administrative Code 7:7A-14.5.* And as the Court reads that section . . . it is the [DEP] **[*16]** who must make the determination that the issuance of the permit was based upon false or

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[5] As for plaintiffs' alternative contention that the judge should have allowed them to amend their pleadings to include an ERA claim, suffice it to say, plaintiffs never made such a request below. Plaintiffs were free, of course, to amend their complaint before defendant's responsive pleading, Rule 4:9-1, but chose not to do so.

> inaccurate information. I note that the department, while being provided with copies of various reports of Dr. Walker and various copies of things, is not a party to this action. . . . [T]he case law that says the Court should defer to agencies where by legislative authority -- in this case the Administrative Code -- the agency is vested as the place of first review. . . . [T]his court is not going to usurp what the Administrative Code says which it should be the province of the department who is the overall regulator of the [FWPA] to make that determination.

Indeed, plaintiffs acknowledge a pending DEP investigation of the alleged FWPA violations at the time the dismissal motion was heard. As such, plaintiffs' ERA claim is substantively defective for failure to show agency inaction. This critical defect, together with the procedural deficiencies already noted, defeats plaintiffs' so-called ERA claim.

(B)

Plaintiffs' challenge to the dismissal of their fraud-related claims is multi-faceted. They argue that the general release signed by the parties at closing did not preclude their claims; that the **[*17]** trial court misapplied the parol evidence rule; and that the Consumer Fraud Act applies. We disagree with these contentions.

(i)

At closing, the parties executed a release stating:

> I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:
> Any and all claims arising out of the transfer of title of premises known as 317 East Greystone Road, Old Bridge, New Jersey between the parties.

Because the parties disputed the property boundaries of Lot 60.12 at time of closing, plaintiffs argued below that the release should be limited to claims involving that dispute and that they could not have waived claims of which they were unaware. The motion judge rejected this argument, stating:

> The release that is provided to this Court is a very broad release and it releases any and all claims arising out of the transfer of title of premises known as 317 East Greystone Road [(Lot 60.12)], Old Bridge, New Jersey, between the parties.
>
> . . . .
>
> It is a very **[*18]** broad release and it releases any and all claims. And to the extent there was any dispute . . . as to acreage, that could have been put in there if, as plaintiffs say, it was only because there was a dispute in the listing agreement . . . . This is about as broad a release as you can get releasing any and all claims. I can't read in what plaintiffs' counsel wants me to read into the release.

Consequently, the judge dismissed plaintiffs' fraud-related claims in part because the broad language of the release prohibited them from seeking any relief from a lawsuit based on their contract. We find no fault with this reasoning.

"The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances." *Bilotti v. Accurate Forming Corp., 39 N.J. 184, 203, 188 A.2d 24 (1963)*. "A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." *Id. at 204*. Moreover, when a release's language refers to "any and all" claims, as here, courts generally do not permit exceptions. **[*19]** *Isetts v. Borough of Roseland, 364 N.J. Super. 247, 255-56, 835 A.2d 330 (App. Div. 2003)*. Thus, the fact that plaintiffs may have been unaware of defendant's intentions as to Lots 60.11 and 60.13, in and of itself, does not entitle them to avoid the effect of the broad provisions of the general release.

(ii)

Even if the release were not dispositive of the fate of plaintiffs' fraud-related claims, the contract of sale, in our view, is. Such claims are based on alleged oral representations by defendant that Lots 60.11 and 60.13 were undevelopable and that he would not develop them. The parties' contract, however, does not contain such

representations and in fact provides just the opposite, namely that plaintiffs were not relying upon any representations made by defendant not expressly in the contract:

> NO RELIANCE ON OTHERS: This Agreement is entered into based on the knowledge of the parties as to the value of the land and whatever buildings are upon the Property and not on any representation made by the SELLER, the named Broker(s) or their agents as to character or quality. THIS MEANS THAT THE PROPERTY IS BEING SOLD "AS IS", EXCEPT AS OTHERWISE MENTIONED IN THIS AGREEMENT.

The contract also contained **[*20]** an integration clause further buttressing the fact that plaintiffs were not relying on any representations of defendant in agreeing to purchase Lot 60.12:

> BINDING AGREEMENT: This Agreement binds the SELLER and BUYER and also their heirs and personal representative in the case of death. It also is the entire and only Agreement between the parties and neither has made any promise or guaranty not contained in this Agreement.

Consequently, the judge found the contract dispositive of the issue:

> [One of Defendant's arguments is] that parol evidence bars the change of the contract, specifically the real estate contract, Paragraph . . . 19 and 20 of the contract of sale. . . . [W]hich are that we are making no other representations not contained in this agreement and that this is the entirety of the agreement, cannot under case law be altered by the parol evidence rule; that this Court's function is not to make a better agreement than that which was assigned by the parties. As I understand [the Plaintiffs'] argument, they are trying to say that somehow there were misrepresentations in connection with that.
>
> However, . . . by way of the briefs and the certifications that the misrepresentations really **[*21]** relate to what the defendant entity did vis-a-vis the wetland issue as opposed to the representations in the contract . . . .
> So the Court is -- is inclined to agree . . . that the parol evidence should not be used to alter that contract . . . .

Where a contract demonstrates that the parties have merged all prior negotiations and agreements in writing, the parol evidence rule bars evidence of prior negotiations and agreements tending to add or vary the terms of the writing being considered. *Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570, 573, 598 A.2d 1234 (App. Div. 1991)*. This tenet is especially true when the contract itself contains an integration clause. *Harker v. McKissock, 12 N.J. 310, 321-22, 96 A.2d 660 (1953)* ("The essence of voluntary integration is the intentional reduction of the act to a single memorial; and where such is the case the law deems the writing to be the sole and indisputable repository of the intention of the parties.") (citations omitted).

To be sure, "[i]ntroduction of extrinsic evidence to prove fraud in the inducement . . . is a well-recognized exception to the parol evidence rule." *Filmlife, supra, 251 N.J. Super. at 573*. However, "[e]xtrinsic evidence to prove fraud is **[*22]** admitted because it is not offered to alter or vary express terms of a contract, but rather, to avoid the contract or to prosecute a separate action predicated upon the fraud[,]" *id. at 573-74*, and provided that the alleged fraud concern a matter not addressed in the agreement. *Id. at 575*.

Our decision in *Filmlife* is illustrative. In *Filmlife, supra*, the plaintiff entered into a lease for a 1989 Lincoln Town Car. *251 N.J. Super. at 572*. At the signing of the lease, plaintiff traded in a 1984 Cadillac for a $ 6,000 allowance. *Ibid.* The lease provided that the $ 6,000 trade-in value was a capitalized cost reduction applied as a down payment. *Ibid.* The lease also stated that its four corners "contains the entire agreement" between the parties. *Ibid.* The plaintiff claimed that an employee of defendant automobile lessor made representations to him that the $ 6,000 would be paid in cash. *Ibid.* When the defendant refused to do so, the plaintiff filed suit alleging fraud and misrepresentation. *Ibid.* The trial court dismissed his claim and we upheld the dismissal on the basis that the parol evidence rule precluded plaintiff from introducing extrinsic evidence to vary or contradict the express **[*23]** terms of the lease. *Id. at 573-75*.

Here, plaintiffs do not really seek to void the contract by alleging fraud. On the contrary, the gist of the relief they seek is to void the 2002 subdivision approval and to enjoin defendant from building on Lots 60.11 and 60.13. Moreover, plaintiffs seek to enforce an alleged representation not specified in a contract, which otherwise expressly states that its four corners contain the entire agreement and specifically precludes representations not documented in it. Even more pertinent, the deed conveyed by the contract refers to the Subdivision Plan approved by the Board

for new developments; it makes no representation on behalf of defendant that the two new lots (60.11 and 60.13) would not be developed. Thus, enforcement of the alleged oral assertion would alter the contract terms with respect to representations contrary to both the contract and deed. As noted, extrinsic evidence to prove fraud is not admitted to alter or vary the express terms of a contract. *Filmlife, supra, 251 N.J. Super. at 573-74*.

(iii)

For these reasons, Plaintiffs' consumer fraud claim fares no better. In addition, the CFA applies only to professional sellers of real estate **[*24]** and not isolated one-time sales of residences by homeowners. *Strawn v. Canuso, 140 N.J. 43, 60, 657 A.2d 420 (1995)*, superseded on other grounds by statute, *New Residential Construction Off-Site Conditions Disclosure Act, L.* 1995, *c.* 253, § 1-12 (codified at *N.J.S.A. 46:3C-1 to -12*), as recognized in *Nobrega v. Edison Glen Assoc., 167 N.J. 520, 533, 772 A.2d 368 (2001)*; *DiBernado v. Mosley, 206 N.J. Super. 371, 376, 502 A.2d 1166 (App. Div.)*, *certif. denied, 103 N.J. 503, 511 A.2d 673 (1986)* (recognizing the CFA's purposes was to prevent the deception, misrepresentation, and unconscionable practices of professional sellers seeking mass distribution of many types of consumer goods, not isolated sellers of single residences).

The transaction involved here is a sale of a single-family private residence by its owner. The contract of sale was executed by defendant who occupied the home being sold, and there is no competent evidence that defendant, in his individual capacity, is a commercial seller of real estate, or that the sale of the subject property is anything other than an isolated transactional event. The fact that, for purposes of convenience, defendant transferred title to NSS just prior to closing does not alter the fact that defendant **[*25]** personally executed the contract of sale and is the individual to whom plaintiffs attribute the fraudulent misrepresentations. In our view, the CFA does not apply and therefore the judge properly dismissed plaintiffs' consumer fraud claim.

(C)

In response to plaintiffs' argument that defendant's development of Lots 60.11 and 60.13 created a public and private nuisance, the trial court found:

> This is three lots. It is not a public nuisance as the case law would define to be a public nuisance. There is no widespread impact to this case to invoke the doctrine of public nuisance. Nor does the Court find that there is any private nuisance as the case law says it should be unreasonable interference with the use and enjoyment of land. While I understand that plaintiffs . . . may not be happy that they may have neighbors, that doesn't unreasonably interfere with their use and enjoyment of their land to qualify as a private nuisance as the Court understands the case law.

We agree.

A public nuisance involves a "course of conduct . . . calculated to result in physical harm or economic loss to so many persons as to become a matter of serious concern." *James v. Arms Tech., Inc., 359 N.J. Super. 291, 329, 820 A.2d 27 (App. Div. 2003)* **[*26]** (citations omitted). It may consist of unreasonable interference with the general public's exercise of a common right. *Mayor & Council of Alpine v. Brewster, 7 N.J. 42, 50, 80 A.2d 297 (1951)*. A private person proceeding with a public nuisance claim must demonstrate a special injury. *In re Lead Paint Litigation, 191 N.J. 405, 428, 924 A.2d 484 (2007)*.

There is no competent evidence in the record that development of Lots 60.11 and 60.13 will have a widespread impact or interfere with the public's exercise of a right. Moreover, plaintiffs failed to allege any special harm that development of Lots 60.11 and 60.13 will cause them.

Plaintiffs' argument that development of these lots constitutes a private nuisance is equally unavailing. "The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." *Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448, 149 A.2d 599 (1959)*. Plaintiffs utterly fail to show how development of lots neighboring their home unreasonably interferes with their enjoyment of that home.

(D)

Plaintiffs' complaint also challenged the Board's 2002 approval of defendant's subdivision plan. At the motion proceedings, they argued for enlargement of the *Rule 4:69-6* forty-five **[*27]** day deadline, which had long since passed, based on their allegations that defendant provided misinformation when obtaining the Board's approval. The trial court declined to enlarge the deadline, finding none of *Rule 4:69-6(b)(3)*'s exceptions applied.

Rule 4:69-6 sets forth the relevant deadline for challenging a township board's decision:

> (a) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.
>
> (b) Particular Actions. No action in lieu of prerogative writs shall be commenced
>
> . . . .
>
> (3) to review a determination of a planning board or board of adjustment . . . after 45 days from the publication of a notice . . . .
>
> [*R. 4:69-6*.]

This time proscription should only be enlarged "where it is manifest that the interest of justice so requires." *R. 4:69-6(c)*. The Supreme Court has established three general categories to the "interest of justice" exception: "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public **[*28]** rather than private interests which require adjudication or clarification." *Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 152, 777 A.2d 19 (2001)* (quoting *Brunetti v. Borough of New Milford, 68 N.J. 576, 586, 350 A.2d 19 (1975)*).

None of these categories applies here. There are no novel constitutional issues, no informal or ex parte determinations by administrative officials, and no important public interests requiring adjudication or clarification. Indeed, it is difficult to conceive how plaintiffs could challenge the subdivision plan as an injustice when they voluntarily took advantage of the approval and purchased one of the subdivided lots. There being no reason to relax the time bar of *Rule 4:69-6*, the motion judge properly dismissed plaintiffs' challenge to the Board's 2002 subdivision approval.

(E)

We have considered plaintiffs' remaining arguments and deem them without merit. *R. 2:11-3(e)(1)(E)*.

Affirmed.

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