NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4163-11T4

ALAN E. MEYER, Receiver for
CLARKE BROTHERS, INC., and
CLARKE BROTHERS, INC.,
a New Jersey Corporation,

Plaintiffs-Appellants,

v.

MICHAEL CONSTANTINOU, JAMES
CONSTANTINOU, SJ PRODIGY, INC. and
HAN J. LIM d/b/a ATLANTIC CLEANERS,
SILVER HANGER MANASQUAN, INC. and
JOHN O'CONNOR d/b/a ATLANTIC CLEANERS,
a dissolved corporation, MANASQUAN
PLAZA, INC.,

Defendant-Respondents.

Argued January 24, 2013 - Decided November 15, 2013

Before Judges Sapp-Peterson and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-5712-08.

Robert L. Gutman argued the cause for appellants (Carluccio, Leone, Dimon, Doyle & Sacks, L.L.C., attorneys; Mr. Gutman, of counsel; Christopher J. Dasti, on the brief).

Mary Lou Delahanty argued the cause for respondents Silver Hanger of Manasquan, Inc., d/b/a Atlantic Cleaners, a dissolved corporation and John O'Connor (Delahanty & McGrory, L.L.C., attorneys; Ms. Delahanty, of counsel; R. Kevin McGrory, on the brief).

Han J. Lim, respondent pro se for SJ Prodigy Inc. and Han Lim d/b/a Atlantic Cleaners.

PER CURIAM

Plaintiffs, Alan E. Meyer, receiver for Clarke Brothers, Inc., and Clarke Brothers, Inc.,[1] appeal from a 2012 Law Division order that dismissed without prejudice their 2008 complaint alleging their property had been contaminated by chemicals discharged from a neighboring dry-cleaning business. The Law Division order referred the environmental claims alleged in the complaint to the New Jersey Department of Environmental Protection (DEP) and dismissed without prejudice the remaining tort claims. We affirm.

I.

We derive the following facts from the pleadings and motion record. Plaintiff, Alan E. Meyer, is the court-appointed receiver for Clarke Brothers, Inc., a company that owns property in the Borough of Manasquan (the Clarke Property) where it once operated an auto repair facility and gas station. Defendants, Michael Constantinou and James Constantinou, owned three lots contiguous to the Clarke Property, which they developed as a three-unit retail shopping center in 1996. Plaintiffs allege in

[1] Although Meyer was not appointed receiver for Clarke Brothers, Inc., until June 22, 2007, for ease of reference we will refer to Meyer and Clarke Brothers collectively as "plaintiffs."

their amended complaint that one of the commercial units in the shopping center has been operated as a dry-cleaning business since 1996: First, from 1996 through May 11, 2007, by Silver Hanger Manasquan, Inc.,[2] whose principal is defendant John O'Connor; next, from May 11, 2007, until the date plaintiffs filed their complaint, by defendant Prodigy, Inc., whose principal is defendant Han J. Lim.

In 2007, while remediating contamination caused by chemicals that had leaked from underground gasoline and waste oil tanks on their property, plaintiffs discovered the ground was contaminated by tetrachloroethylene, also known as perchloroethylene (PCE).[3] According to plaintiffs' complaint, PCE is a "chlorinated solvent primarily used in dry cleaning operations" and is also a carcinogen. Plaintiffs denied in their complaint that they had used any chlorinated solvent in their business.

On October 5, 2007, the New Jersey Department of Environmental Protection (DEP) informed Peter Clarke, a principal of Clarke Brothers, that no further action was necessary for the remediation of the contamination caused by the

[2] Counsel for Silver Hanger of Manasquan, Inc. has represented that the corporation is in dissolution.

[3] In their briefs, the parties have referred to the chemical as PCE. Accordingly, we will refer to it as PCE in this opinion.

underground storage tanks. The letter contained an "Initial Notice and Case Assignment Referral," and specifically excluded from DEP's no further action determination the PCE soil contamination. The case assignment referral confirmed that Peter Clarke had "submitted a Memorandum of Agreement (MOA) for the non-UST related contamination." The referral also stated that a "Preliminary Assessement (PA) . . . is necessary[,]" in that "[i]f areas of concern are identified, a site investigation (SI) . . . is also necessary." DEP informed Clarke that "any PCE contamination identified on-site above cleanup criteria would require remediation."

According to their complaint, plaintiffs retained an environmental consulting firm to investigate the source of the PCE contamination.[4] Plaintiffs allege in their complaint that "[t]he additional soil sampling combined with the remedial investigation confirmed that the source of the PCE contamination . . . was from the [dry-cleaning] facility."

Plaintiffs filed their complaint on December 9, 2008. They alleged that PCE had been discharged from the dry-cleaning business in the adjacent shopping center and had migrated downhill onto the Clarke Property. The six-count complaint

[4] Plaintiffs have not included in the record any reports from the consulting firm.

named as defendants the Constantinous, Prodigy, Lim, Silver Hanger, and O'Connor; and stated causes of action for negligence (First Count), nuisance (Second Count), trespass (Third Count), strict liability (Fourth Count), violation of the New Jersey Environmental Rights Act (ERA), N.J.S.A. 2A:35A-1 to -14, and the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 to -23.24 (Fifth Count), and negligence per se (Sixth Count). On April 25, 2011, plaintiffs amended their complaint and alleged in a Seventh Count that the Constantinou defendants fraudulently conveyed title to the shopping center property to a corporation called Manasquan Plaza, Inc. On January 6, 2012, plaintiffs entered a default against Prodigy and Lim. The other defendants filed answers and the parties began to conduct discovery.

While the parties were conducting discovery in the civil action, DEP took some action with respect to both the dry-cleaning property and the Clarke property.[5] On January 13, 2009, DEP sent a "Notice of Deficiency" to Lim and Michael Constantinou that referenced a July 6, 2007 Remedial Investigation Report submitted by Clarke Brothers. According to

[5] Plaintiffs represent in their brief that before filing their complaint and amended complaint, they notified DEP as required by the ERA, and that DEP elected not to join in the civil action. Defendants do not dispute those representations. Plaintiffs have not, however, cited to the record to support those assertions as required by Rule 2:6-2(a)(4).

the DEP letter, "[t]he soil data indicate that the source of the PCE contamination was at the [dry-cleaning] facility." DEP required Lim and Constantinou to submit a Remedial Investigation Work plan.

On January 16, 2009, DEP sent Peter Clarke a "Notice of Deficiency" that referenced the MOA concerning the PCE contamination, and explained the deficiencies as the failure to remediate a discharge and the failure to submit a Preliminary Assessment Report in the required format. A month later, on February 26, 2009, DEP sent a "Directive and Notice to Insurers" to Lim, the Constantinous, and O'Connor. In that notice, DEP informed Lim, the Constantious, and O'Connor it had

> determined that it is necessary to conduct a Departmentally approved remedial investigation at the Contaminated Site in order to fully determine the nature and extent of the problem presented by the discharges. Upon completion of the remedial investigation, it will be necessary to implement a remedial action to address the discharges at the Site.

The notice also stated that Lim, the Constantinous, and O'Connor "are responsible for the discharges of hazardous substances and/or remediation of the hazardous substances discharged at the Site, which were discharged to the lands and waters of the State." DEP sent an amended Directive and Notice to Insurers to Lim, Silver Hanger, and the Constantinous on March 17, 2009.

DEP sent another letter to Lim, the Constantinous, and Silver Hanger on April 15, 2009, approving a Vapor Intrusion Remedial Investigation Work Plan dated March 31, 2009, as amended by emails dated April 7 and April 13, 2009. Two months later, on June 18, 2009, DEP sent a letter to Lim, Silver Hanger, and the Constantinous approving an Interim Remedial Action Work Plan.

More than two years later, on October 27, 2011, DEP mailed a Notice of Violation to the Constantinous, Silver Hanger, and plaintiffs. The notice provided, among other things, that "respondents have failed to conduct the required remediation. The Department has been made aware of the breakdown in negotiations concerning the remediation of PCE contamination identified along the property boundaries between the two referenced sites." Among other violations, DEP cited the parties' "[f]ailure to delineate the vertical and horizontal extent of groundwater contamination and the sources of groundwater contamination including free and residual product."

In November 2011, defendants Silver Hanger and O'Connor filed a motion in the Law Division to refer plaintiff's action to the DEP pursuant to N.J.S.A. 2A:35A-8, the statutory provision of the ERA that directs a court to remit parties to administrative proceedings that are "required or available to

determine the legality of the defendant's conduct." On March 27, 2012, the trial court filed an Order granting the motion.

In the oral opinion it delivered from the bench following oral argument, and in its confirming Order, the trial court explained that it had conducted a conference call "with the DEP, the parties hereto and the Division of Law of the Office of the Attorney General on January 18, 2012[.]" During those conferences the court "determined that the []DEP is acting to enforce the environmental laws, including the [Spill Act] with regard to the Clarke Brothers[,] Inc.[,] property and Constantinou's property." As to the plaintiffs' ERA and Spill Act causes of action, the court explained that the ERA authorized private citizens to pursue civil actions "in circumstances where the DEP fails to do so." The court noted that the ERA confers no substantive rights, but rather authorizes private citizens to enforce state environmental statutes when governmental agencies fail to act. The court also noted that the ERA "is only available to prevent future violations, [but] cannot be used to seek redress for past ones."

The court framed the issues it had to decide as "whether the actions taken by the DEP to remedy the contamination on the Clarke Brothers property is sufficient to protect the environment [and] whether Clarke Brothers' Spill Act enforcement action seeks to enforce the Spill Act to prevent a violation

that will likely reoccur in the future." Acknowledging that the DEP had not filed a "court action," the trial court determined that DEP had "taken positive steps in promoting the cleanup of the site." Summarizing the directives DEP had sent to the parties, and pointing out that DEP "continues to act to encourage voluntary remediation without the necessity of assessing fines," the court found that DEP had "been obviously involved in this site up until the present time." The court continued:

> It is clear that plaintiffs' purpose in bringing this lawsuit was to allocate fault for the contamination. While plaintiff may be correct in its assertion that the various dry cleaning businesses are responsible, actual responsibility is irrelevant to the purposes of this motion. The purpose of the ERA private right of action is . . . the redress of public harm, not private harms. And the DEP has been shown to have taken steps to force the private parties to remediate the harm caused by the property.
>
> The DEP seeks remediation of contaminated sites without regard to fault. Once a cleanup is complete Clarke Brothers may certainly seek to determine fault[] and obtain contribution for its cleanup action.
>
> . . . .
>
> Insofar as Clarke Brothers alleges common law causes of action the Court finds that judicial economy requires that the action be referred to the DEP, that the balance would be dismissed without prejudice since all of the same facts will be necessary to establish claims under the Spill Act as they would under the common law causes of action.

II.

Plaintiffs contend the trial court erred when it determined that DEP had primary jurisdiction. They argue that the court failed to consider all of the factors needed to conduct a proper "primary jurisdiction" analysis. Plaintiffs also contend that the trial court misconstrued our holding in Township of Howell v. Waste Disposal, Inc., 207 N.J. Super. 80 (App. Div. 1986), which the trial court relied upon when it dismissed plaintiffs' complaint without prejudice.

Defendants concede the trial court did not articulate all of the factors relevant to a primary jurisdiction analysis, but suggest the court's consideration of all relevant factors is implicit in its opinion. Defendants also argue that, contrary to plaintiffs' assertion that DEP has neglected to take essential action, DEP has been actively involved in overseeing the remediation of the PCE contamination.

We consider the trial court's decision under well-settled principles of appellate review. The trial court's factual determinations "are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). We owe no special deference, however, to "'[a] trial court's interpretation of the law and the legal consequences

that flow from established facts.'" N.J. Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 541 (App. Div. 2011) (alternation in original) (quoting Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)), aff'd as modified, 212 N.J. 153 (2012).

With those principles in mind, we turn to plaintiffs' first argument, namely, that the trial court misapplied the primary jurisdiction doctrine. We reject plaintiffs' argument. We also question the need to resort to the doctrine of primary jurisdiction in a case involving a private action, filed under the ERA to enforce the Spill Act, when DEP is not a party.

The statutory provisions of the ERA appear to include the same objectives as the judicial doctrine of primary jurisdiction.

> "The doctrine of primary jurisdiction . . . comes into play whenever enforcement of [a] claim [originally cognizable in the courts] requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."
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> [Woodside Homes, Inc. v. Town of Morristown, 26 N.J. 529, 541 (1958) (quoting United States v. W. Pac. R. Co., 352 U.S. 59, 63-64, 77 S.Ct. 161, 164-65, 1 L.Ed.2d 126, 132 (1956)).]

The primary jurisdiction doctrine "promotes proper relationships between courts and regulatory agencies." Campione v. Adamar of N.J., Inc., 155 N.J. 245, 263 (1998). Thus, it "may be appropriate, in order to avoid piecemeal adjudication or duplicative, anomalous or contradictory results, for a court to defer in its jurisdictional exercise, even if only temporarily, while the administrative agency with the primary interest sorts out the issues and the claims." Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 425 (App. Div. 2002).

DEP is the administrative agency with primary power to enforce most of the State's environmental legislation, including the Spill Act. See Twp. of Howell, supra, 207 N.J. Super. at 94. Nevertheless, the ERA "empowers any person to maintain an action to enforce or restrain violation of any statute, regulation or ordinance establishing protection against impairment or destruction of the environment." Id. at 93 (quoting N.J.S.A. 2A:35A-4a).

> To insure . . . and protect against improper encroachment on [DEP's enforcement] responsibility, the [ERA] provides that any action instituted pursuant to its authority requires notice to the DEP. N.J.S.A. 2A:35A-11. Obviously, this notice requirement was designed to allow that agency to exercise value judgments in individual cases, e.g., whether it will join in that litigation or enforcement proceeding, whether other actions it may

> have taken already with respect to the particular problem or offender would render the litigation subject to collateral estoppel or res judicata principles, whether its expertise would assist the court, whether broad state interests would be sacrificed unduly to regional or personal interests by the instigators of that litigation, etc.
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> [Id. at 95.]

The ERA thus promotes proper relationships between courts and DEP, and protects against piecemeal adjudication or duplicative, anomalous or contradictory results, but does so by vesting DEP with the authority to decide whether it should intervene in a private litigant's ERA action. "Obviously, if the DEP expresses no interest and elects not to join that action, in the absence of a court ordering it to be made a party, . . . the action may proceed in accordance with the rights accorded in the [ERA]." Ibid.

That is not to say that the expertise of administrative agencies are unavailable to the court. When a private person seeks to enforce an environmental law through an ERA action, the court is required to determine "any alleged pollution, impairment or destruction of the environment, or the public therein," N.J.S.A. 2A:35A-7(a), and "adjudicate the impact of the defendant's conduct on the environment and on the interest of the public therein," N.J.S.A. 2A:35A-7(b). "If necessary a court may utilize the expertise of interested administrative

agencies to assist it in reaching a just result." Twp. of Howell, supra, 207 N.J. Super. at 94.

In the case before us, plaintiffs rely primarily on our decisions in Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000) and Boldt V. Correspondence Mgmt., 320 N.J. Super. 74 (App. Div. 1999), to support their argument that the trial court misapplied the doctrine of primary jurisdiction. There was no need, however, for the court to resort to the doctrine of primary jurisdiction. Neither case involved the ERA. Muise involved claims against a utility for electric-service outages, Muise, supra, 332 N.J. Super. at 146, and Boldt involved "an issue of alleged overcharging for medical records," Boldt, supra, 320 N.J. Super. at 77. Consequently, we consider whether the trial court erred under the ERA when it referred plaintiffs' action to the DEP.

Plaintiffs notified DEP of their lawsuit, as required by the ERA, before filing their complaint and again before filing their amended complaint. DEP took no action to intervene. Accordingly, plaintiffs could "proceed in accordance with the rights accorded in the [ERA]." Twp. of Howell, supra, 207 N.J. Super. at 95. Nevertheless, the court was not prohibited from "utiliz[ing] the expertise of interested administrative agencies to assist it in reaching a just result," Id. at 94. Moreover, "[i]f administrative or other proceedings are required or

available to determine the legality of the defendant's conduct, the court shall remit the parties to such proceedings, except where immediate and irreparable damage will probably result . . . ." N.J.S.A. 2A:35A-8.

The court made no record of its telephone conversation with the Office of the Attorney General. Although the parties dispute whether DEP was acting efficiently and expeditiously, they do not dispute that DEP had directed remediation of both the Clarke property and the property where the dry cleaning business was located. And though the court, not DEP, was required to allocate liability for remediation costs, GEI Int'l Corp. v. St. Paul Fire and Marine Ins. Co., 287 N.J. Super. 385, 393 (App. Div. 1996), aff'd sub nom. on other grounds, Ciba-Geigy Corp. v. Liberty Mut. Ins. Co., 149 N.J. 278 (1997), such costs could not be determined until DEP approved the methodologies for determining the extent of the contamination and removing it. See Metex Corp. v. Federal Ins. Co., 290 N.J. Super. 95, 115 (App. Div. 1996). For that reason, the court properly exercised its authority to utilize the expertise of DEP to assist it in reaching a just result. Twp. of Howell, supra, 207 N.J. Super. at 94.

To be sure, the trial court could have accomplished the same result without dismissing plaintiff's complaint without prejudice. That may have been a more appropriate course of

action, particularly in view of DEP's non-intervention in the lawsuit after twice receiving notice of the action from plaintiffs. Plaintiffs have the ability, however, to cooperate with DEP in determining the extent of the contamination and the scope of the cleanup. Once those objectives are accomplished, plaintiffs can move to reinstate their complaint. We discern no basis for interfering with the court's referral of the case to DEP for that limited purpose.

Affirmed.