WINDELS MARX | Windels Marx Lane & Mittendorf, LLP

windelsmarx.com

Michael J. Connolly
973.966.3244
mconnolly@windelsmarx.com

One Giralda Farms | Madison, NJ 07940
T. 973.966.3200 | F. 973.966.3250

8/7/18

REDACTED VERSION

August 2, 2018

BOARD OF PUBLIC UTILITIES
AUG 02 2018
MAIL RECEIVED

VIA HAND DELIVERY & ELECTRONIC MAIL

Aida Camacho-Welch, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue
3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350

RECEIVED
CASE MANAGEMENT
AUG 02 2018
BOARD OF PUBLIC UTILITIES
TRENTON, NJ

Re: In the Matter of the Verified Petition of Jersey Central Power & Light Company For Approval of the Sale and Conveyance of Certain Portions of its Property in the Borough of Allenhurst, Monmouth County, New Jersey and the Granting and Transfer of Certain Easements in Connection Therewith Pursuant to N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6.
BPU Docket No. EM18020193

Dear Ms. Camacho-Welch:

On behalf of Jersey Central Power & Light Company ("***JCP&L***" or the "***Company***"), enclosed for filing in the above-referenced matter are the original and 11 copies of JCP&L's reply to the comment letter ("***Comment Letter***") submitted by the Division of Rate Counsel ("***Rate Counsel***") to the New Jersey Board of Public Utilities (the "***Board***" or "***BPU***") on July 25, 2018 in this proceeding regarding JCP&L's petition for approval (the "***Petition***") of the sale (the "***Sale***") of its Allenhurst property (the "***Allenhurst Property***") to the winning bidder (the "***Buyer***") for a purchase price of $5,238,095.24 (the "***Purchase Price***").

In the Comment Letter, Rate Counsel does not object to the Company's Sale of the Allenhurst Property, to the reserving and providing of easements under the Purchase and Sale Agreement (the "***PSA***") or to the Board's approval of the Sale under N.J.S.A. 48:3-7 and

CMS
A. Morgan, Esq.
list copied

N.J.A.C. 14:1-5.6, which the Company appreciates. However, the Comment Letter also suggests that the Board should set certain conditions on its approval of the Sale related to the accounting for the Sale's transaction, including the treatment of a post-closing escrow arrangement (the "***Post-Closing Escrow***") and the allocation as between ratepayers and the Company of the gain on the Sale of the Allenhurst Property. The Company takes issue with these suggested conditions as, and to the extent, discussed herein.

JCP&L Withdraws its Request for Additional Relief

At the outset, it may be helpful to clarify, and confirm the Company's position with respect to the "Additional Relief" requested in ¶16 of the Petition.[1] Thus, the Company hereby confirms, as Rate Counsel requested the Board to require JCP&L to do, that it withdraws the request for the Additional Relief described in ¶16 of the Petition. As stated in several discovery responses, JCP&L is not seeking the Additional Relief. During the discovery phase of this proceeding, the Company realized that the underlying reason for requesting Additional Relief (*i.e.*, the anticipated need to await receipt of a certain Response Action Outcome ("***JCP&L***

[1] In ¶16 of the Petition, the Company stated:

> In addition to seeking the Board's approval of the sale of the Allenhurst Property to Buyer upon the terms and conditions described and discussed herein, the Company also specifically notes that it retains liability for, among other things, compliance with remediation obligations under ISRA (as defined herein at ¶21.c. below), breaches of representations and warranties by the Company, and other matters. Therefore, the Company seeks additional relief in the form of a Board authorization to defer any costs relating to its ISRA remediation obligations (as generally described below in ¶21.c.) with respect to the Allenhurst Property for future recovery from customers through JCP&L's non-utility generation clause ("***Additional Relief***").

RAO")) no longer existed because the JCP&L RAO was, in fact, received. This alleviated the need for the Additional Relief, of which the Company advised Rate Counsel and Staff in its discovery responses.

However, because Rate Counsel also includes a very broad request for an acknowledgement that the Company "no longer seeks, … , any environmental cost that may be incurred other than as discussed below (footnote omitted)" (Comment Letter at p. 4) further clarification is warranted. Assuming the Sale is approved by the Board and proceeds to closing thereafter, there would be no further environmental costs associated with the Allenhurst Property that would be incurred by the Company for which recovery would be necessary or requested, except with respect to the potential for future environmental costs associated with the use of the easement, which is retained by the Company.

As explained in the Petition, the easement is necessary to provide the Company with continuing access to operate and maintain certain electrical distribution and transmission facilities located on the Allenhurst Property, which are not being sold as part of the Sale. ***See***, ¶¶14, 22, 37, and 40 of the Petition. These facilities and the retained easement property have been, are, and will continue to be, used and useful in connection with the provision of electric service to customers. Certainly, there is no need to address, let alone waive (and the Company specifically does not waive), the right to seek recovery at the appropriate time of any future

potential costs, including environmental costs, associated with these components of its current and ongoing operations.

No Reason to Change the Long-Standing Board Policy On the Treatment of Gains on Sale

Rate Counsel's Comment letter takes the position that JCP&L's proposal to allocate the net gain equally between the Company's shareholders and the Company's customers in accord with Board precedent is not fair to JCP&L's ratepayers in this instance, taking the further extreme position that "the entire net gain on the sale of the Allenhurst Property should be booked to Account 253 [Other Deferred Credits] for final review in the Company's next base rate case." Comment Letter at p. 7. Rate Counsel does not suggest a specific alternative allocation but only a postponement of the allocation determination until the Company's next base rate case. The Company believes the recommendation is unnecessary and should be rejected.

JCP&L's proposal to share the gain equally with ratepayers is thoroughly consistent with the Board Order, dated November 14, 2005, approving the sale of JCP&L's Bernardsville Commercial Office (BPU Docket No. EM04111473), the Board Order dated December 5, 2005 (BPU Docket No. EM04101073) approving the sale of a JCP&L property in Belford, and the Board Order on December 21, 2005 (BPU Docket No, EM04040229) approving the sale of JCP&L property in Lakewood.

In each case, the Board directed the Company to account for 50% of the gain on the sale of property in Account 421.1 for immediate distribution to the Company's shareholders and to

book the other 50% of the gain to the suspense Account 253-other deferred credits. The deferred liability in Account 253 would be held for appropriate distribution to benefit ratepayers in the Company's next base case. This has also been the consistent approach in other Board proceedings not involving JCP&L. Indeed, Rate Counsel has not articulated a distinguishing circumstance as to why this Sale is any different than any other of the plethora of utility petitions for the sale of utility assets, which the Board has approved and to which the Board has applied its policy on the equal sharing of the gain; obviously, because there is no distinction.

In addition, as mentioned above, the Rate Counsel Comment Letter briefly acknowledges that the Company's proposal is consistent with Board precedent. Comment Letter at p. 7. Without citation to authority, special circumstances, or any detailed discussion as to why, Rate Counsel asks the Board to disregard its long-standing policy treatment in this case. Moreover, JCP&L has not sought any exception or variance from the application of the long-standing policy to share gains equally between shareholders and ratepayers. Therefore, Rate Counsel's unsupported recommendation to abandon the Board's policy should be rejected.

Further, the Board's orders approving sales and the implementation of the well-established policy on the equal sharing of gains typically contains a reservation by the Board to the effect that:

> [t]his Order shall not affect or in any way limit the exercise of the authority of this Board to revisit the issues related to ratemaking treatment of this transaction in the Company's next rate proceeding, nor shall it affect or in any way limit the

> exercise of the authority of this Board to revisit the methodology employed in the distribution of the proceeds of this transaction.

See, the Board Orders, dated: (i) November 14, 2005 in BPU Docket No. EM04111473, (ii) December 5, 2005 in BPU Docket No. EM04101073, and (iii) December 21, 2005 in BPU Docket No, EM04040229, *supra*. *See* also, the Board Order dated August 8, 2008 in BPU Docket No. EMO5070650 (In the Matter of the Petition of Public Service Electric & Gas Company (PSE&G) for the Approval of the Sale and Conveyance of ... Distribution Right-of-Way ... in the Town of Kearny...). This type of standard reservation by the Board provides adequate and appropriate protection of ratepayer interests without the need to abrogate the application of the Board's long-standing policy for the Company to account for the gain on an equal share basis.

Indeed, attempting to prevent the Company from implementing the Board's policy without good cause beyond a broad statement that the "the utility's ratepayers have carried the cost of [the Allenhurst Property] with no corresponding benefit for many years" (Comment Letter at p. 8) runs counter to Board of Public Utility Com'rs v. New York Telephone Co., 271 U.S. 23, 32 (1926), in which the United States Supreme Court said:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do no acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock.

Rate Counsel's unsupported conclusion also ignores the retained easement (discussed below) and the fact that the Company's substantial transmission and distribution facilities, which are not being sold or abandoned as part of the Sale, have continuously been, and will continue to be, located, operated and maintained on the Allenhurst Property. These facts belie any unsupported suggestion that ratepayers have not benefited from the Company's continued use of the Allenhurst Property for these purposes. Thus, contrary to the suggestion of Rate Counsel's Comment Letter, ratepayers have no special claim to the Allenhurst Property (or any other JCP&L asset) regardless of how long it has been "in rates." Such general claims do not provide any basis whatsoever for not applying the Board's standard, long-standing, and well-established rules and policies to the accounting for the gain on the Sale in this proceeding.[2]

The Post-Closing Escrow is a Transaction Cost

The Rate Counsel Comment Letter also takes issue with the Company's proposal to treat the Post-Closing Escrow as a transaction closing cost. The Comment Letter suggests that the

[2] The Comment Letter appears, in part, to also base this request on the belief that "there are outstanding remediation costs associated with the Property for which JCP&L will seek recovery in the Company's next base rate case." Comment Letter at pp. 6-7 citing the Company's response to RCR-28, which is attached hereto. In this regard, the Company's response to RCR-28 (Exhibit A hereto) only indicates that "JCP&L includes non-MGP environmental costs in its base rate test year expense," which is where a prudence-review typically occurs. It does not say anything about outstanding costs or seeking recovery in the next base rate case. *See*, also, the Company's response to RCR-5, which is attached to the Rate Counsel Comment Letter. Thus, Rate Counsel's statements about the inclusion of outstanding remediation costs associated with the Allenhurst Property would only be applicable to the extent that there were any such known and measurable costs included as test-year expenses at the time of JCP&L's next base rate case, the timing of which is unknown. Such speculative supposition on Rate Counsels part is certainly not a proper basis to ignore the Board's well-established treatment of gains on the sale of utility property in this proceeding.

Post-Closing Escrow amount constitutes environmental costs related to the Company's environmental responsibilities, which are being transferred to Buyer. Therefore, the Comment Letter recommends that, rather than treat such costs as transaction costs, as the Company indicates, the costs should be considered Company environmental costs with the review of such costs and the recovery of them, to await the Company's next base rate case.

The Company believes the Rate Counsel position taken in its Comment Letter may be based on a misunderstanding about the reasons for the Post-Closing Escrow. The Company observes that the Comment Letter first correctly acknowledges that the Post-Closing Escrow "creates a fund for Buyer's use related to Buyer's post-closing [redacted] responsibilities" (Comment Letter at p. 5) but then goes on to incorrectly state that the "escrow funds represent the cost of completing JCP&L's biennial environmental monitoring obligations that the Buyer assumed." Comment Letter at p. 6. In this regard, the Comment Letter relies on (and attaches) the Company's response to a discovery data request RCR-29, in particular footnote 1, which explained, in pertinent part, as follows:

> The post-closing escrow agreement, which is explained in the Company's response to RCR-40, does not constitute a Company post-closing environmental cost responsibility but rather a transaction cost responsibility, which creates a fund for Buyer's use related to Buyer's post-closing ... responsibilities as described in the Memorandum of Understanding and the Post-Closing Escrow Agreement.

It appears that the Comment Letter inaccurately conflates the Buyer's assumption of biennial monitoring responsibilities under the PSA with the Buyer's own separate and distinct

post-closing [redacted] responsibilities which the Post-Closing Escrow was intended and created to address.

The JCP&L RAO discharged JCP&L of any going-forward environmental responsibilities for the Allenhurst Property relative to its use by JCP&L, besides the biennial monitoring, which Buyer agreed to undertake under the PSA.[3] Buyer has its own post-closing [redacted] responsibilities associated with its planned or anticipated use of the Allenhurst Property following consummation of the Sale.[4]

These responsibilities are separate and distinct from the responsibilities that JCP&L has already fulfilled as per the JCP&L RAO, or transferred (*i.e.*, the biennial monitoring) with respect to JCP&L's ownership and use of the Allenhurst Property.

The Buyer's Post-Closing RAO relates only to Buyer's [redacted] responsibilities borne out if its plans for using the Allenhurst Property following closing. It has nothing at all to do with the biennial monitoring under the final JCP&L RAO. Instead, it is a form of conditional [redacted] escrow, which is common in commercial real estate transactions involving

[3] Indeed, the JCP&L RAO, which the Company obtained, obviated the need for the "Additional Relief" requested in ¶16 of the Petition, which, as discussed above, JCP&L has withdrawn.

[4] The Post-Closing Escrow, a copy of which was provided in response to RCR-39 Confidential and described and discussed in the Company's response to RCR-40 Confidential (and in the supplemental response to RCR-40 Confidential), states that it relates to the Buyer's obtaining, post-closing, [redacted] for the entirety of the Allenhurst Property being conveyed under the PSA (the "***Buyer's Post-Closing*** [redacted]"). *See*, Post-Escrow Agreement at §2. (e) (ii). Please note that the Company's responses to RCR-39, RCR-40 and RCR-40 Supplemental were attached to the Rate Counsel Comment Letter in both confidential and redacted versions).

industrial facilities, negotiated to lock-in (through the waiver of the right to terminate) the Buyer's commitment to its bid, the highest bid received by the Company through its thorough and diligent sales and marketing process.[5]

The impact of an [redacted] escrow is the same as any typical transaction cost, which results in a conditional adjustment to the purchase price that is reflected in the immediate net proceeds from the sale at closing. This adjustment reflects the transactional cost for protecting, preserving, and, hopefully, expediting the consummation of a very successful and beneficial sale. It does so by bringing the due diligence process and Buyer's right to terminate the PSA to a conclusion in exchange for providing Buyer with a source of limited funding with which to address certain types of verifiable costs related to the Buyer's ability to obtain the Buyer's Post-Closing [redacted], which is solely related to the Buyer's post-closing responsibilities arising from its intended use of the Allenhurst Property. These Buyer [redacted] responsibilities are distinct from and have nothing to do with JCP&L's [redacted] responsibilities relative to its prior use of the Allenhurst Property. Put simply, the Post-Closing Escrow addresses Buyer's [redacted] issues.

The Post-Closing Escrow does not address obligations that JCP&L would have under [redacted] law. Instead, it addresses the market reality reflected in the bidding submittals and results that, even though JCP&L was not obligated to do anything further to

[5] *See*, the Company responses to ENG-1 Confidential, and RCR-47 Confidential.

satisfy its [redacted] obligations, the Buyer's [redacted] concerns associated with its intended use of the property were not unique and needed to be addressed in order to avoid the risk of termination under the due diligence provision of the PSA and [redacted].

As for treating the amount of the Post-Closing Escrow as a transaction cost at closing, the Rate Counsel Comment Letter states that a "typical commercial real estate transaction involves certain types of closing cost; however, those costs do not include [redacted] costs (footnote omitted)." Comment Letter at pp. 5-6. In support of this overly broad contention, Rate Counsel provides (in footnote 4) a non-exclusive list of typical closing costs, gleaned from a newspaper article and a continuing legal education publication, which does mention [redacted] related matters and escrow costs but does not mention [redacted] costs. These citations are hardly persuasive.

Commercial real estate transactions most certainly do include [redacted] escrows. *See*, for example, Moretran Realty, LLC v. Baldev Patel & Son, *LLC*, No. A-2753-15T3, 2017 N.J. Super. Unpub. LEXIS 2121 (Super. Ct. App. Div. Aug. 23, 2017); (noting that $100K was escrowed at closing for [redacted] issues); and Deforest Inv. Co., LLC v. Cushman & Wakefield of N.J., Inc., No. A-3467-09T2, 2012 N.J. Super. Unpub. LEXIS 75 (Super. Ct. App. Div. Jan. 12, 2012). (mentioning the creation of an escrow of $1M for [redacted] issues that

reduced the amount of the purchase price upon which a real estate commission would be paid).[6] *See* also, Nettles, L, and Cohen, A, [redacted] Considerations in Business Transactions, American Bar Association Section of [redacted], Energy, and Resources (43rd Spring Meeting, Salt Lake City, UT, March 20-22, 2014 ("The parties may implement ... through an escrow account that would be applied to any future [redacted] liabilities; that account may include a 'hold-back,' which earmarks some of Seller's sale proceeds for [redacted] costs.")[7]

Moreover, although dealing in the context of condemnation, the Court, in Casino Reinvestment v. Teller, 894 A.2d 1215 (N.J. Super. App. Div. 2006), concluded that [redacted] are a transactional part of the calculation of the value of property, citing Housing Auth. of City of New Brunswick v. Suydham Investors, LLC, 177 N.J. 2, 25 (2003) ("[it] would be unfair ... to value the property as if [redacted] and allow the condemnee to withdraw that enhanced amount without a withholding to secure the transactional costs [of the [redacted]]").

---

[6] Copies of the cited unpublished decisions are attached as Exhibit B hereto. Pursuant to R. 1:36-3, JCP&L is unaware of any contrary unpublished opinions.

[7] *See*, https://www.americanbar.org/content/dam/aba/events/[redacted]_energy_resources/2014/03/43rd-spring-conference/conference_materials_portal/14-nettles_larry-paper%20and%20cohen_abbi.authcheckdam.pdf *See* also Dalton v. Shanna Lynn Corp., No. A-4846-12T1, 2015 N.J. Super. Unpub. LEXIS 1916 (Super. Ct. App. Div. Aug. 10, 2015) ("...one possible remedy would have been to escrow some or all of the proceeds of the sale pending resolution of the problem. Such a [redacted] escrow is common in real estate transactions.")

Therefore, as set forth above, the Post-Closing Escrow cannot be properly characterized as anything but a transaction cost of the Sale, which effectively reduces the proceeds of the Sale from which the gain is calculated. To do otherwise would be inappropriate.

The Treatment of Unused Post-Closing Escrow Funds

The Rate Counsel Comment Letter is also concerned about the lack of definitiveness regarding the timing for the use of the Post-Closing Escrow funds by Buyer and the treatment of any unused funds. Comment Letter at p. 5. The Comment Letter then requests that the Board direct the Company to specify a date by which ratepayers will be credited any funds remaining in escrow.[8] Rate Counsel's concerns are unnecessary. Section 1(e) (ii) of the Post-Closing Escrow states that "... the Escrow Funds shall be retained by Escrow Agent until such time as [Buyer's Post-Closing [redacted]] is issued ..." Further, upon receipt of Buyer's Post-Closing [redacted] any remaining funds are to be disbursed to JCP&L. Section 1(e)(ii) (1). Finally, upon disbursement of all Escrow Funds, the Post-Closing Escrow will terminate under Section 14 thereof.

Thus, there is both conceptual certainty regarding timing – obtaining the Buyer's Post-Closing [redacted], and certainty as to the disposition of any remaining funds. Rate Counsel is correct

[8] Later in the Comment Letter, Rate Counsel asks the Board to order "JCP&L to book any escrow amount refunded by the Buyer to Account 253, Other Deferred Credits, for appropriate disposition in JCP&L's next rate case." Comment Letter at p 6. In its concluding section, the Comment Letter repeats its request for a directive that "4. JCP&L shall set a date certain by which it will credit to ratepayers any amounts remaining in escrow after the closing, as part of the net gain from the sale." Comment Letter at p. 9. This is either a repeated inadvertent inconsistency, or an insight into Rate Counsel's views regarding the allocation of the gain on the Sale. In either event, the treatment of the proceeds relative to the allocation of gain is fully addressed above.

that there is no specific statement in the Petition regarding the treatment of the remaining funds in the possession of the Company. However, consistent with the Company's response to RCR-25 (Exhibit C hereto), since any remaining funds from the Post-Closing Escrow are related to the Sale transaction and would be treated, in the normal course of business, as an adjustment to the proceeds of the Sale, which, in turn, would cause an adjustment in the calculation of the gain on the sale, which would be treated in the same 50-50 manner as the Company has proposed in its *pro forma* journal entries (as contained in the Company's response to RCR-42 Attachment 1), consistent with the Board's long-standing policy as discussed above.

Conclusion

For the foregoing reasons, the Rate Counsel Comment Letter conditions and arguments are inaccurate, unsupported, unnecessary and/or inconsistent with the Board's standard and long-standing approach to the review and approval of utility property sales under N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6. Therefore, JCP&L respectfully recommends that the Board reject conditions #2, #3, #4 and #5 as found in the Rate Counsel Comment Letter and the arguments made in

support thereof.[9]

Kindly stamp one of the enclosed copies as "filed" and return to the undersigned using the enclosed self-addressed stamped envelope. Thank you in advance for your cooperation.

Respectfully submitted,

Michael J. Connolly

MJC:km

cc: (w/enc.: Service List as indicated)

[9] For purposes of clarity regarding the Petition Appendices, the Company is making a supplemental filing under separate cover of: (i) the Post-Closing Escrow, which was referred to as Appendix B-4 in the Petition, provided as an attachment to the Company's response to RCR-39 Confidential and was also attached to the Rate Counsel Comment Letter; (ii) the Appraisal, which was referred to as Appendix D in the Petition, and provided as an attachment to the Company's response to RCR-41 Confidential, which was cited by the Rate Counsel Comment Letter (at p. 3 and footnote 1 thereof); and (iii) the *pro-forma* journal entries, which were referred to as Appendix E in the Petition and provided as an attachment to the Company's response to RCR-42, which is cited by the Rate Counsel Comment Letter (at p. 7).

JERSEY CENTRAL POWER & LIGHT COMPANY

I/M/O the Verified Petition of Jersey Central Power & Light Company For Approval of the Sale and Conveyance of Certain Portions of its Property in the Borough of Allenhurst, Monmouth County, New Jersey and the Granting and Transfer of Certain Easements in Connection Therewith Pursuant to N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6.

BPU Docket No. EM18020193

**JCP&L M.A. Mader, Director New Jersey Rates Jersey Central Power & Light Company 300 Madison Avenue P.O. Box 1911 Morristown, New Jersey 07960 (973) 401-8697 mamader@firstenergycorp.com	**JCP&L K.F. Connelly, Staff Analyst Rates & Regulatory Affairs Jersey Central Power & Light Company 300 Madison Avenue P.O. Box 1911 Morristown, New Jersey 07960 (973) 401-8708 kconnelly@firstenergycorp.com	**JCP&L Levin, Joshua E FirstEnergy Service Company 76 S. Main Street Akron, OH 44308 (330) 384-5690 levin@firstenergycorp.com
**JCP&L James O'Toole Jersey Central Power & Light Company 300 Madison Avenue P.O. Box 1911 Morristown, New Jersey 07960 (973) 401-8296 jotoole@firstenergycorp.com	**JCP&L M. Espinoza Jersey Central Power & Light Company 300 Madison Avenue P.O. Box 1911 Morristown, New Jersey 07960 mmespinoza@firstenergycorp.com	**JCP&L Harry A. Flannery, Esq. FirstEnergy Service Company 76 S. Main Street Akron, OH 44308 (330) 761-4206 flanneryh@firstenergycorp.com
**JCP&L Lauren Lepkoski, Esq. FirstEnergy Service Company 2800 Pottsville Pike Reading, Pennsylvania 19601 (610) 921-6213 llepkoski@firstenergycorp.com	**JCP&L Michael Connolly, Esq. Windels Marx Lane & Mittendorf, LLP One Giralda Farms Madison, NJ 07940 (973) 966-3244 mconnolly@windelsmarx.com	**JCP&L Gregory Eisenstark, Esq. Windels Marx Lane & Mittendorf, LLP 120 Albany Street Plaza New Brunswick, NJ 08901 732.448.2537 geisenstark@windelsmarx.com
**JCP&L Grace C. Bertone, Esq. Bertone Piccini LLP 777 Terrace Avenue, Suite 201 Hasbrouck Heights, NJ 07604 (201) 483-9333 gbertone@bertonepiccini.com	*BPU Office of Secretary New Jersey Board of Public Utilities Attn: Aida Camacho 44 South Clinton Street, 9th Floor PO Box 350 Trenton, New Jersey 08625-0350 Board.secretary@bpu.nj.gov	*BPU Paul Flanagan Executive Director NJ Board of Public Utilities 44 South Clinton Avenue, 10th floor CN 350 Trenton, NJ 08625-0350 Paul.Flanagan@bpu.nj.gov
*BPU Thomas Walker, Director	*BPU Stacy Peterson	*BPU Noreen Giblin, Chief Counsel

Division of Energy Board of Public Utilities 44 South Clinton Avenue – 9th Floor P. O. Box 350 Trenton, New Jersey 08625-0350 Thomas.Walker@bpu.nj.gov	Board of Public Utilities Division of Energy 44 South Clinton Avenue,9th Floor P.O. Box 350 Trenton, NJ 08625-0350 (609) 292-4517 stacy.peterson@bpu.state.nj.us	Board of Public Utilities 44 South Clinton Avenue, 9th Floor P. O. Box 350 Trenton, New Jersey 08625-0350 noreen.giblin@bpu.state.nj.us
**BPU Geoff Gersten Deputy Attorney General Division of Law, Public Utilities 124 Halsey Street P.O. Box 45029 Newark, NJ 07101 geoff.gersten@dol.lps.state.nj.us	*BPU Bethany Rocque-Romaine, Esq NJ Board of Public Utilities Legal Specialist 44 South Clinton Avenue, 10th floor CN 350 Trenton, NJ 08625-0350 bethany.rocque-romaine@bpu.state.nj.us	*BPU Megan Lupo, Esq. NJ Board of Public Utilities Legal Specialist 44 South Clinton Avenue, 10th floor CN 350 Trenton, NJ 08625-0350 megan.lupo@bpu.state.nj.us
*BPU Stacy Richardson, Esq NJ Board of Public Utilities Legal Specialist 44 South Clinton Avenue, 10th floor CN 350 Trenton, NJ 08625-0350 stacy.richardson@bpu.state.nj.us	*Rate Counsel Stephanie Brand, Esq. Division of Rate Counsel 140 East Front Street, 4th Floor P.O. Box 003 Trenton, NJ 08625 (609) 984-1460 sbrand@rpa.state.nj.us	*Rate Counsel Ami Morita Division of Rate Counsel 140 East Front Street, 4th Floor P.O. Box 003 Trenton, NJ 08625 (609) 984-1460 amorita@rpa.state.nj.us

*Indicates Service by Hand Delivery

**Indicates Service by Regular U.S. Mail and/or Electronic Mail

EXHIBIT A

I/M/O the Verified Petition of Jersey Central Power & Light Company For Approval of the Sale and Conveyance of Certain Portions of its Property in the Borough of Allenhurst, Monmouth County, New Jersey and the Granting and Transfer of Certain Easements in Connection Therewith Pursuant to N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6

BPU Docket No. EM18020193

RESPONSE TO DISCOVERY REQUEST

RCR-28 Please identify when the Company proposes to address the prudency of its environmental costs relating to the Property.

Response: JCP&L includes non-MGP environmental costs in its base rate test year expense. Therefore, a prudence review occurs in the context of a base rate proceeding. **See** the Company's introductory response to RCR-1. In addition, the environmental-related work conducted on the property was required by the New Jersey Department of Environmental Protections (NJDEP) as part of the Technical Requirements for Site Remediation (TRSR), the Industrial Site Recovery Act (ISRA), and/or the Site Remediation Reform Act (SRRA). All remedial work was completed, and approved, under the supervision of a Licensed Site Remediation Professional (LSRP). Where applicable, the Company and the LSRP used guidance, regulations and professional judgement to minimize the cost of the remediation. This included the use of Restricted Use Soil Remediation Standards, Historic Fill Guidance, placement of Deed Restrictions on the properties, and the use of Groundwater Classification Exemption Areas and monitored Natural Attenuation for groundwater. Only as necessary, and in areas where small soil quantities were present, was active remediation performed. **See also** RCR-3 for additional information regarding each identified Area of Concern.

EXHIBIT B

Moretran Realty, LLC v. Baldev Patel & Son, LLC, 2017 N.J. Super. Unpub. LEXIS 2121

Copy Citation

Superior Court of New Jersey, Appellate Division

February 14, 2017, Argued; August 23, 2017, Decided

DOCKET NO. A-2753-15T3

Reporter
2017 N.J. Super. Unpub. LEXIS 2121 * | 2017 WL 3611595

MORETRAN REALTY, LLC, Plaintiff-Appellant, v. BALDEV PATEL AND SON, LLC, BALDEV PATEL and CHETAN PATEL, Defendants-Respondents.

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-9032-14.

Counsel: John R. Edwards, Jr., argued the cause for appellant (Price, Meese, Shulman & D'Arminio, PC, attorneys; Mr. Edwards, on the briefs).

Douglas J. Kinz argued the cause for respondent.

Judges: Before Judges Messano and Espinosa.

Opinion

PER CURIAM

Plaintiff Moretran Realty, LLC, purchased commercial real estate property (the Property) from defendant Baldev Patel and Son, LLC (Seller) for $1.6 million. The parties agreed to escrow $100,000 for environmental issues pursuant to an escrow agreement that also required personal guarantees from defendants Baldev Patel and Chetan Patel (collectively the Patels).[1] This appeal concerns the disposition of the escrowed funds, each side claiming entitlement to the funds. Plaintiff appeals from an order that denied its motion for partial summary judgment and granted summary judgment to defendants, dismissing the complaint with prejudice. We affirm.

I.

When Seller purchased the Property in 2009, its commercial lender obtained a Phase I Environmental Assessment Report that identified two environmental issues on the Property. Both issues concerned contamination discovered after the [*2] removal of two 1,000-gallon underground heating oil storage tanks (UST) in 1999 and 2005.

Groundwater near the first UST was contaminated with gasoline constituents that were determined to have migrated from the adjacent U-Haul facility. Following remediation efforts under the supervision of the New Jersey Department of Environmental Protection (NJDEP), the NJDEP issued a No Further Action (NFA) letter for the Property regarding the removal of this UST. The second UST was found to have leaked, resulting in soil and groundwater contamination. Following remediation efforts, NJDEP issued an NFA letter for this UST in 2009.

In March 2012, plaintiff entered into a contract with Seller to purchase the Property. During the ninety-day inspection period, plaintiff's attorney sent written notice to defendants that plaintiff elected to terminate the contract because it had "discovered various unacceptable conditions at the Property including . . . environmental areas of concern and significant defects in the structure of the building and its systems."

The environmental areas of concern (AOC) were identified in a report prepared by TRC Environmental Corporation (TRC) following its inspection of the [*3] Property.[2] TRC reported it had identified eighteen AOCs. It recommended "additional information or further investigation for" five AOCs:

AOC 2c Abandoned Fuel Oil UST (Unknown Capacity)

AOC 2d Abandoned 2,500-Gallon #2 Fuel Oil UST

AOC 9 Inactive Production Well

AOC 11 Off-Site Impacts

AOC 12 Debris Piles

TRC recommended "No Further Action . . . for the remaining AOCs." Among those were AOC 2a and AOC 2b, which referred to the 1,000 gallon USTs removed in 1999 and 2005, respectively, and which were the subjects of NFA letters from the NJDEP.

Plaintiff's counsel wrote a letter to defendant's attorney, dated June 25, 2012, that "confirm[ed] the terms upon which" plaintiff was willing to proceed with the sale. The letter set forth a number of modifications to the contract of sale, including:

1. The contract price is to be amended to $1,477,000.00. It is specifically understood and agreed that the [P]roperty is being sold physically, "as-is" except for the noted issues stated herein;

2. The sum of $100,000.00 will be escrowed at closing, to be held in trust by [S]eller's attorney, *for environmental issues related to the two (2) underground storage tanks, and the contamination generally identified by U-Haul. The $100,000.00 [*4] shall be released upon the sooner of six (6) months from the closing or U-Haul assuming without reservation the clean-up of the subject [P]roperty.* In the event that a Phase-I report by the lender shall reveal any additional environmental issues, the seller shall be entitled to cancel the contract unless the buyer waives the additional issues found. Additionally, *[Baldev Patel and Chetan Patel] will personally hold [plaintiff] harmless from any environmental issues related to the two (2) underground storage tanks, and the contamination generally identified by U-Haul on the [P]roperty. The personal guarantees shall be released upon U-Haul assuming the clean-up as above referenced*;

3. A phase I report must be accepted by [plaintiff's] lender so the transaction may be financed as contemplated;

4. The closing will be July 17, 2012, subject to the substantive and scheduling requirements of the lender; . . . .

[(Emphasis added).]

Both parties agree the closing occurred on September 11, 2012. The parties executed an escrow agreement that incorporated terms agreed upon in the June 25, 2012 letter:

[T]he parties have agreed that an escrow shall be established and an escrow agent shall be appointed to enable certain environmental [*5] work to be completed, as further described herein, and for [plaintiff] to receive the appropriate documentation of completion of the environmental work . . . .

2. Seller and [plaintiff] agree that the Escrowed Funds will be held in trust by the Escrow Agent, for environmental issues related to the two (2) underground storage tanks on the Property, and the contamination generally identified by U-Haul. The Escrowed Funds shall be released upon the sooner of six (6) months from the closing date, or U-Haul assuming without reservation the clean-up of the Property.

3. Baldev Patel and Chetan Patel jointly, severally and personally will hold [plaintiff] harmless from any environmental issues related to the two (2) underground storage tanks, and the contamination generally identified by U-Haul on the Property. The personal guarantees shall be released upon U-Haul assuming without reservation the clean-up of the Property.

According to a certification submitted by John Muchmore, the sole principal of plaintiff, "U-Haul took the position it was not responsible for any of the clean-up" after the closing. The parties extended time periods to further investigate the possibility that U-Haul would assume [*6] responsibility for the clean-up but U-Haul continued to deny any responsibility.[3] Plaintiff made numerous demands for defendants to take care of the clean-up; defendants refused to do so or release the escrowed funds for plaintiff to use for clean-up costs. Muchmore certified further "[t]he Property was contaminated at and prior to the . . . sale" and that "defendants are solely responsible for the costs" which plaintiff has incurred and will incur.

In the certification he submitted in opposition to plaintiff's motion, Chetan stated there was no contamination on the Property and no clean-up necessary at the time of the closing.

Remediation of the U-Haul site continued under the direction of Environmental Resources Management (ERM). In January 2013, ERM conducted groundwater sampling of eleven monitoring wells on the U-Haul site. Finding no excess levels of the gasoline constituents in wells close to the Property, ERM concluded there was no evidence of any contamination migrating from the U-Haul site and that no clean-up was necessary on the Property.

When the six-month period expired, plaintiff's counsel requested an extension for ninety days. He also demanded the escrowed funds not be released [*7] and that Seller "immediately undertake the required clean-up, including . . . the groundwater remediation." A letter from plaintiff's counsel, dated April 5, 2013, confirms that defendants did not agree to the extension.

An email, dated July 26, 2013, from Alex Yankaskas, Vice President of Environmental Compliance Monitoring, Inc. (ECM), a licensed site remediation professional (LSRP), to plaintiff's counsel provided his interpretation of a report on groundwater sampling information from the U-Haul site. Yankaskas stated, "At this first, quick glance, this does not appear to support a strong contention relative to an off-site source migrating eastwardly." Although the email stated Yankaskas would take a more thorough look at the report, there is no evidence that his conclusion was altered by further review.

Plaintiff's counsel asserted that he and Yankaskas had conversations with defendants' former attorney, Bennett Wasserstrum, that purportedly reflected an agreement by defendants "to do the work they were obligated to do" regarding the site.

In an email relied upon by plaintiff dated March 26, 2014, Yankaskas states:

I reached and spoke with Bennett Wasserstrum just now. He is onboard [*8] with our recent discussions. We will provide him a proposal this week for the borings.

One point that came to mind relative to Patel vs. [plaintiff] as the client: The results will be the client's (whomever that may be) and therefore, there should be an agreement between the parties to share those findings.

As part of that agreement, it would be prudent to add/confirm mutual objectives for the work, especially given the potential LSRP aspect (*if on-site contamination is confirmed*).

[(Emphasis added).]

ECM presented the following Proposed Scope of Work:

The proposed investigation will consist of a limited soil boring and ground water sampling program and associated reporting. This program is designed to assess general environmental conditions relative to two [USTs] previously removed from the site and potential gasoline groundwater contamination migrating from the adjacent (U-Haul) site.

A draft agreement prepared by plaintiff's attorney stated the parties agreed ECM would "conduct the investigation and take the LSRP position in remediating the [P]roperty as required by existing law." This agreement was never executed.

Plaintiff brought this action, seeking declaratory judgment pursuant to the [*9] *Spill Compensation and Control Act*, N.J.S.A. 58:10-23.11 to -23.24, that defendants are jointly and severally liable for all investigatory, cleanup and removal costs and expenses and also seeking treble damages and indemnification. In addition, plaintiff alleged causes of action based on negligence, strict liability, nuisance, breach of contract and indemnification from the Patels pursuant to their personal guarantees. Defendants filed an answer and counterclaim in which they demanded judgment against plaintiff compelling the release of the escrowed funds. Plaintiff filed a motion for partial summary judgment, to compel the release of the escrowed funds for it to use for clean-up costs and to require the Patels to be liable for those costs. Defendant filed a cross-motion for summary judgment, seeking the dismissal of the complaint and release of the escrowed funds.

At oral argument, defense counsel argued plaintiff had produced no evidence of contamination to support its claims. Plaintiff contended such evidence existed, citing a reference in a certification from Wasserstrum to TRC's recommendation for "further investigation" regarding two USTs, AOC 2c and AOC 2d, one 2,500 gallon tank and the other of unknown [*10] capacity. In the certification, Wasserstrum maintained there was no contamination associated with these two tanks. He further asserted that plaintiff's concern and the subject of the escrow agreement were the two USTs removed from the Property in 1999 and 2005.

The trial judge denied plaintiff's motion for partial summary judgment, granted defendants' cross-motion for summary judgment and set forth her reasons on the record. She stated:

Plaintiff has conceded that U-Haul refused to assume responsibility for any cleanup of the [P]roperty since its testing revealed no evidence of ongoing contamination and the need for any such cleanup. Accordingly, more than six months have passed from the closing date, under the express language of the agreement . . . the escrow funds must be released.

The trial judge also noted the existence of evidence to support the conclusion that there was no contamination on the Property and the absence of evidence to the contrary.

In its appeal, plaintiff argues summary judgment should not have been granted [4] because there were genuine issues of material fact (Point I), the matter was not ripe for summary judgment (Point II) and the trial judge erred in making factual determinations [*11] based on information that related to the U-Haul site rather than to the Property (Point III). After reviewing these arguments in light of the record and applicable principles of law, we conclude they lack merit and further, the arguments raised in Points II and III require no discussion. *R.* 2:11-3(e)(1)(E).

II.

In reviewing a decision on a summary judgment motion, we view the evidence "in the light most favorable to the non-moving party," *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 529, 666 A.2d 146 (1995), to determine whether the competent evidential materials presented "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law," *R.* 4:46-2(c).[5]

In *Cortez v. Gindhart*, 435 N.J. *Super.* 589, 90 A.3d 653 (App. Div. 2014), *certif. denied*, 220 N.J. 269, 105 A.3d 1102 (2015), we described the proofs necessary to defeat a motion for summary judgment:

[T]he opponent must "'come forward with evidence' that creates a genuine issue of material fact." "An issue of fact is genuine only if, considering [*12] the burden of persuasion at trial, the *evidence* submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact."

Although we must view the "evidential materials . . . in the light most favorable to the non-moving party" in reviewing summary judgment motions, we emphasize that it is *evidence* that must be relied upon to establish a genuine issue of fact. "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'"

[*Id.* at 605 (citations omitted).]

The issues presented by this appeal concern a question of law, the interpretation of the escrow agreement language, and a question of fact, whether the evidence supported the disbursement of the escrowed funds to Seller.[6]

A.

Because the interpretation of a contract is a question of law, our review is de novo. *Kieffer v. Best Buy*, 205 N.J. 213, 222, 14 A.3d 737 (2011). "The judicial task is simply interpretative; it is not to rewrite a contract for the parties better than or different from the one they wrote for themselves." *Id.* at 223. Contractual terms should be read and interpreted by using "their plain and ordinary meaning." *M.J. Paquet, Inc. v. N.J. Dep't of Transp.*, 171 N.J. 378, 396, 794 A.2d 141 (2002). However, "[i]f the terms of [*13] the contract are susceptible to at least two reasonable alternative interpretations, an ambiguity exists," *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 239, 948 A.2d 1285 (2008), and extrinsic evidence may be used to discern the parties' intent, *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 270, 901 A.2d 341 (2006).

Neither party contends the language of the escrow agreement is ambiguous and we agree. The funds were explicitly "held in trust . . . for environmental issues related to the two (2) underground storage tanks on the Property, and the contamination generally identified by U-Haul." The escrow agreement also established the criteria for the release of the escrowed funds: "The Escrowed Funds shall be released upon the sooner of six (6) months from the closing date, or U-Haul assuming without reservation the clean-up of the Property."

The parties agree the closing occurred on September 11, 2012. It is also undisputed that U-Haul never assumed responsibility for a clean-up of the Property and, in fact, affirmatively disclaimed any responsibility for a clean-up. Contrary to plaintiff's assertion, there is no evidence in the record that defendants agreed to an extension of the six-month period. Therefore, the escrow agreement provided for the release of the escrowed funds at the end of the six-month period.

B.

Plaintiff [*14] contends summary judgment should not have been granted because it presented evidence in the form of "the no further action letter, the TRC report and the proposed scope of work to be done sent on March 31, 2014" that established a genuine issue of fact as to the existence of contamination on the Property. We disagree.

As we have noted, the escrow agreement called for the release of funds no later than six months after the closing. The discovery of any contamination on the Property thereafter would not, therefore, have any bearing on whether the escrowed funds should be released. Plaintiff has produced no evidence of any contamination from "the two (2) underground storage tanks on the Property, and the contamination generally identified by U-Haul" within that six-month period. The ERM tests done in January 2013 found no evidence of any contamination migrating from the U-Haul site, the basis for U-Haul's conclusion that no clean-up was necessary on the Property. Plaintiff has presented no evidence that refutes that conclusion within the six-month period.

Even if we review the record beyond the six-month period, plaintiff has still produced no evidence of actual contamination relating to [*15] the issues identified in the escrow agreement. At best, plaintiff has produced a proposal from ECM to conduct investigative borings. But even in making the proposal in March 2014, Yankaskas referred to activity that would occur "*if* on-site contamination is confirmed." (Emphasis added). Thus, even a year after the escrow period had expired, there was no proof of contamination relating to the USTs referenced in the escrow agreement or contaminants that had migrated from the U-Haul site.

Affirmed.

Footnotes

- [1]

Because they share the same surname, we refer to these defendants by their first names; we mean no disrespect.

- 2

The report provided in Plaintiff's appendix is titled, "Preliminary Assessment/Phase I Environmental Site Assessment Report" and is labeled "DRAFT" throughout.

- 3

This assertion was not supported by any corroborating evidence and was disputed.

- 4

Plaintiff has not argued the trial judge erred in denying its motion for partial summary judgment.

- 5

Plaintiff was required and did not support its motion with a statement of material facts that includes

> a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.
>
> [*Rule* 4:46-2(a).]

- 6

Defendants concede that their agreement to indemnify plaintiff survives the dismissal of plaintiff's complaint.

Caution
As of: July 27, 2018 9:37 PM Z

Dalton v. Shanna Lynn Corp.

Superior Court of New Jersey, Appellate Division

November 6, 2014, Argued; August 10, 2015, Decided

DOCKET NO. A-4846-12T1

Reporter
2015 N.J. Super. Unpub. LEXIS 1916 *; 2014 WL 10208986

LAWRENCE J. DALTON and CHRISTINE M. DALTON, Plaintiffs-Appellants/Cross-Respondents, v. SHANNA LYNN CORPORATION, LOUIS W. GARMAN, SR., THERESA MADERICH, JOSEPH MADERICH, AGNES MADERICH, VIRGIL ANN MADERICH, HENRY MADERICH and LERCO FUEL OIL COMPANY, Defendants-Respondents/Cross-Appellants.

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, Gloucester County, Docket No. L-1046-99.

Core Terms

equitable, oil, tank, trial judge, remediation, leak, site, contamination, spill, plaintiffs', certif, equitable remedy, fuel oil, representations, constructive trust, injunctive relief, fraud claim, reconstruction, Environmental, detrimental, recommended, injunction, rescission, Marks

Counsel: Louis Giansante argued the cause for appellants/cross-respondents (Giansante & Associates, LLC, attorneys; Mr. Giansante, of counsel and on the brief).

Betsy G. Ramos argued the cause for respondents/cross-appellants Shanna Lynn Corporation, Louis W. Garman, Sr., Theresa Maderich, Joseph Maderich, Agnes Maderich, Virgil Ann Maderich, Henry Maderich (Capehart & Scatchard, P.A., attorneys; Ms. Ramos, on the brief).

Judges: Before Judges Waugh, Maven, and Carroll.

Opinion

PER CURIAM

Plaintiffs Lawrence J. Dalton and Christine J. Dalton appeal the judgment entered by the Law Division on April 30, 2013, as well as the supplemental judgment entered on July 12. They argue that the remedy ordered by the trial judge was insufficient. Defendants Shanna Lynn Corporation (Shanna Lynn) and its owners, defendants Louis W. Garman, Sr., Theresa Maderich, Joseph Maderich, Agnes Maderich, Virgil Ann Maderich, and Henry Maderich,[1] cross-appeal from the same judgments, arguing that the trial judge should have dismissed plaintiffs' claim and awarded no remedy. We affirm.

I.

We briefly outline the facts and procedural history discerned from the record on appeal. They are set forth in more detail in our earlier opinion in this matter. *Dalton v. Shanna Lynn Corp. (Dalton I), No. A-0048-10, A-1944-10, 2012 N.J. Super. Unpub. LEXIS 874 (App. Div. Apr. 19, 2012), certif. denied, 213 N.J. 44, 59 A.3d 601 (2013).*

In 1988, Shanna Lynn owned the Rainbow Inn, a property including a liquor store and bar on North Delsea Drive in Clayton. The Daltons entered into a contract with Shanna Lynn and certain of the individual defendants to purchase the business.

There was a 550-gallon underground fuel oil tank on the property. On August 10, which was before the closing, defendant Lerco Fuel Oil Company[2] (Lerco) delivered

[1] We refer to the defendants collectively as the Shanna **[*2]** Lynn defendants. We note that the trial judge found in favor of defendants Joseph Maderich and Agnes Maderich and dismissed all individual claims against them.

[2] Lerco is not a party to this appeal because the claims against

fuel oil and filled the tank to capacity. In order to receive credit for a full tank at closing, the Shanna Lynn defendants had Lerco return on August 29, the day of the closing, to top off the tank so it would be completely full.

Shortly after the closing, the Shanna Lynn defendants received **[*3]** a receipt for the oil. It showed that Lerco had delivered 530 gallons of oil that day, even though the tank was full less than three weeks earlier. Because such a large use of fuel oil in a short period of time was atypical, defendant Theresa Maderich (Maderich) sought an explanation. According to Maderich, when she expressed concern about the delivery, the night watchman told her that he had seen someone siphoning oil out of the tank the night before.

The next day, Carl Kirstein, the president of Lerco, contacted Maderich and told her the volume of oil was too large, based on the short period of time that had passed since the most recent oil delivery. After Maderich told him that she did not suspect theft, Kirstein told her there must be a leak. He recommended emptying the underground tank and installing aboveground storage tanks in the basement. Kirstein further testified that he sent Maderich a letter explaining that the tank was leaking into the surrounding ground. Maderich, however, maintained that neither she nor Lerco suspected or knew whether oil had been stolen or if there was a problem. She also denied receiving Kirstein's letter.

However, the Shanna Lynn defendants directed **[*4]** Lerco to pump out the underground tank, which only had 238 gallons of oil at that time. They also arranged for the installation of aboveground tanks in the basement. Both actions were done at the expense of the Shanna Lynn defendants. None of the defendants disclosed to the Daltons their reasons for doing so.

In January 1995, there was a fire at the Rainbow Inn. In June 1997, during reconstruction, a contractor informed the Daltons that he had discovered black sludge that smelled like oil. Although they agreed that the sludge smelled like oil, the Daltons decided to continue reconstruction because the contractor told them the oil would not interfere with the work. The Daltons did not take any samples or report the presence of the oil in the ground to anyone or any governmental agency. Reconstruction was completed and the Rainbow Inn reopened in March 1998.

On January 4, 1999, the Daltons served a notice of suit on the defendants, the Attorney General, and the Commissioner of Environmental Protection, claiming that the defendants had violated 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*, based **[*5]** on the leak that occurred on the property when the Shanna Lynn defendants were the owners.

On June 8, the Daltons filed a ten-count complaint in the Law Division, alleging a variety of statutory and common law claims against Shanna Lynn, the individual defendants, and Lerco. The Daltons also hired Marks Environmental, Inc. (Marks Environmental), to perform a site investigation. In November 2000, Marks Environmental reported that the abandoned underground fuel oil tank was the source of the black sludge uncovered by the excavation during the reconstruction. The report recommended a full site characterization study to be followed by any required remediation. The study was needed to determine the vertical and lateral extent of soil contamination and the existence of any groundwater contamination. The Daltons did not conduct the recommended study.

In December 2002, the Law Division dismissed the consumer fraud, negligence, and statutory claims against the Shanna Lynn defendants, as well as all claims against Lerco. The matter went to trial in March 2006. At the close of the Daltons' case, the judge dismissed all breach of contract and fraud claims against the Shanna Lynn defendants, except **[*6]** the claim for equitable fraud.

The judge found that the Daltons had established a prima facie case of equitable fraud. He requested further legal arguments concerning the remedy, taking into consideration the lapse of time since the sale, the failure to act when the ground oil was discovered, and the absence of a definitive investigation to delineate the scope of the damage and any efforts to remediate the property. The judge struck the jury demand because the case now involved only an equitable claim.

Without resuming the trial, the judge dismissed the equitable fraud claim on October 15, 2010. He held that the classic equitable remedies of rescission and reformation of the sales agreement were not available because of the passage of time. The judge also cited plaintiffs' decision to proceed with reconstruction of the damaged building in 1997 without remediation of the condition resulting from the 1988 spill and dismissal of

---

it were dismissed.

the Spill Act and ERA claims because "plaintiff[s] had not complied with the statutory obligations." The trial judge entered an order dismissing the equitable fraud claim. The Daltons appealed.

In *Dalton I, supra, 2012 N.J. Super. Unpub. LEXIS 874 at *15*, we affirmed as to all issues except the dismissal of the equitable fraud claim. **[*7]** We concluded that the trial judge's holding "that plaintiffs had adduced sufficient evidence to require denial of the Shanna Lynn defendants' motion for judgment at the close of plaintiffs' case [was] well-founded" based on the evidence presented. *2012 N.J. Super. Unpub. LEXIS 874 at 15*.

We addressed the remedy issue in the event the trial judge were to find in favor of the Daltons.

> The trial judge could have issued a mandatory injunction requiring the Shanna Lynn defendants to conduct an investigation of the contamination, to undertake remediation of the site, or to contribute a share of the costs to remediate the site. It does not appear from this record that he gave such injunctive relief any consideration. Although we hold that plaintiffs have no bases as yet to recover under the Spill Act, we note that injunctive relief is one of the remedies available under this statute to obtain remediation of contaminated sites, *N.J.S.A. 58:10-23.11u*, and the nature of the equitable fraud in this case suggests such relief may be a suitable remedy to plaintiffs.
>
> Delays of cleanup efforts in contamination cases are particularly costly due to the potential damages suffered by the environment. New Jersey courts have recognized that "the determination **[*8]** of responsibility between or among successive owners possibly liable for the contamination may impede the swift implementation of cleanup efforts . . . ." [*Superior Air Prods. Co. v. NL Indus., Inc.], 216 N.J. Super. [46, 61-62, 522 A.2d 1025 (App. Div. 1987), appeal dismissed by 126 N.J. 308, 598 A.2d 872 (1991)]*. In light of this concern, courts have imposed remedies to ameliorate the damage caused by environmental hazards as liability litigation drags along:
>
> > Injunctions are generally used in pollution-related actions brought on the theory of nuisance, although in proper circumstances they may be issued in actions brought for negligence and trespass, and if there is no other adequate remedy, an injunction is available *to abate continuous and permanent pollution that causes irreparable injury*, or to prevent a multiplicity of suits.
> >
> > [*61C Am. Jur. 2d Pollution Control § 1932* (2010) (emphasis added) (footnotes omitted).]

Of course, final injunctive relief will be imposed only when the party seeking such relief demonstrates that it has established the liability of the other party, the need for injunctive relief, "and the appropriateness of such relief on a balancing of equities." *Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397, 904 A.2d 725 (App. Div. 2006)*; *Samaritan v. Borough of Englishtown, 294 N.J. Super. 437, 442-44, 683 A.2d 611 (Law Div. 1996)*. In *Sheppard v. Frankford, 261 N.J. Super. 5, 617 A.2d 666 (App. Div. 1992)*, this court identified other factors that may inform the decision to grant final injunctive relief. These non-exclusive factors include:

> (1) the character **[*9]** of the interest to be protected; (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies; (3) the unreasonable delay in bringing suit; (4) any related misconduct by plaintiff; (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted; (6) the interests of others, including the public; and (7) the practicality o[f] framing the order or judgment. *Restatement (Second) of Torts § 936* (1977).
>
> [*Id. at 10*.]

Here, the trial judge terminated the trial at the close of plaintiffs' case. He had an incomplete record to determine whether plaintiffs would be entitled to relief in the nature of a mandatory injunction which would require the Shanna Lynn defendants to participate in a preliminary assessment of the site that would identify the site of the spill, any migration of the spill, and the existence and extent of ground and water contamination.

To be sure, plaintiffs have not demonstrated that they face immediate and irreparable harm. On the other hand, the trial judge found plaintiffs' claim of equitable fraud well-founded in the facts, and the ramifications of a discharge of approximately 1000 gallons of fuel oil into the **[*10]** ground will not vanish. To remediate the discharge, plaintiffs face the prospect of conducting a comprehensive study

> to ascertain the extent of soil and groundwater contamination due to the 1988 oil spill. The cost of such a study may be expensive, and any remediation will consume time, energy and financial resources. Admittedly, their actions in 1997 may have made remediation of the site more difficult and more costly but the truncated record due to the trial judge's failure to consider any equitable remedy other than rescission or reformation of the 1988 contract does not permit a definitive resolution of plaintiffs' right to this relief.
>
> [*2012 N.J. Super. Unpub. LEXIS 874 at *25*.]

Consequently, we reversed in part and remanded the equitable fraud claim "to permit the trial to proceed to conclusion." *2012 N.J. Super. Unpub. LEXIS 874 at *26*.

Following the remand, the parties recreated the trial record and supplemented it with deposition transcripts. The judge then heard argument on whether plaintiffs had demonstrated equitable fraud and, if so, what the remedy would be. On April 25, 2013, he placed an oral decision on the record, finding Shanna Lynn and the individual defendants, except for Joseph Maderich and Agnes Maderich,[3] liable for equitable fraud. The **[*11]** judge explained his reasons as follows:

> The fact that the knowledge came after is not an impediment to the finding of equitable fraud as a result. Because arguably, under equitable fraud, knowledge is not proof to be shown. If the fact is known after and not before closing[, that] makes the claim by [p]laintiff[s] stronger . . . .
>
> The fact that they did become knowledgeable of the concern makes [p]laintiff[s'] claim stronger. Because at that point, citing to [*Hernig v. Harris, 117 N.J. Eq. 146, 175 A. 169 (Ch. 1934)*], it's knowledge that what they had said before was not true, and that the problem is continuing damage.
> So you know that you had a problem that is just not a problem that caused damage when I had it, it's causing damage now. Because we just put the oil in and it's continuing even to this point. And it's not a one-time concern.
> It is the continuing nature of the problem of the oil in the ground that creates the problem for [d]efendants having knowledge now of the issue and not bringing it to light and rectifying that circumstance at that point in time.
> And so I'm satisfied the first element of equitable fraud is made out.
>
> The second element is made knowing that it was false. Now, that element in equitable fraud is not required. The second element knowledge, is not necessary. **[*12]** And I read the different cases that direct that.
> But in this case we do have knowledge. It's post closing, but I've already found that the fact that it's post closing does not negate the fact of the equitable fraud.
>
> Three, detrimental reliance incurred upon the representation. Well, the detrimental reliance is the fact that [p]laintiff[s] trusted — going back to that *Hernig* case — trusted the representations that were given to them by [defendants]. And that the property was in good stead. That it didn't have a problem with the oil.
> And we're willing to accept that based on those representations. And the detriment was that the information once known, not having been revealed, took from [plaintiffs] the ability to take more contemporary action, more immediate action.
> . . . .
> It took from [plaintiffs] themselves the ability to exercise more immediate action, to investigate and clean up, which would have been more concentrated oil that had not had a chance to migrate.
> And all those things are to the detriment of the [p]laintiff[s], and it's based on the reliance of the representations made by the [d]efendant[s] that they were delivering a clean site.
>
> And based on that, I'm satisfied that all of the elements of equitable fraud **[*13]** have been shown, that they've been shown by the clear and convincing weight of the evidence in the record. And that as a result, the liability claim of equitable fraud by [p]laintiff[s] against [d]efendants has been made out.

The judge ordered the Shanna Lynn defendants to take the steps required to investigate the oil contamination and complete the necessary clean up and remediation. However, taking into account the Daltons' delay in taking action once the leak was discovered, he ordered that the costs associated with the investigation and remediation, including funds already expended by the Daltons for those purposes, be allocated between the

[3] Joseph and Agnes Maderich had not signed the contract of sale for the property, and consequently had made no representations with respect to the oil tank and property.

parties as follows: sixty-five percent to be borne by the liable defendants and thirty-five percent by the Daltons. The judge denied plaintiffs' request for rescission, recoupment, disgorgement, and counsel fees. He further ordered a constructive trust to preserve existing assets and an accounting to determine available assets. The judge entered the judgment on April 30, and the supplemental judgment **[*14]** on July 12. This appeal followed.

II.

On appeal, the Daltons contend that the relief awarded was inadequate, did not fully enforce their equitable rights, and allowed the Shanna Lynn defendants to retain profits attributable to their fraud while forcing them to bear the cost of thirteen years of litigation. The Shanna Lynn defendants cross-appeal, arguing that there was no equitable fraud and that the trial judge erred in requiring a constructive trust and an accounting.

When reviewing a decision resulting from a bench trial, "[t]he general rule is that [factual] findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12, 713 A.2d 390 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484, 323 A.2d 495 (1974)). We do not disturb the factual findings of the trial judge unless we are "convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 412 (quoting Rova Farms, supra, 65 N.J. at 484) (internal quotation marks omitted); see also Beck v. Beck, 86 N.J. 480, 496, 432 A.2d 63 (1981).

Because the fashioning of equitable remedies is generally left to the discretion of the trial judge, who must balance the facts he or she has found with the equities established by those findings to fashion a remedy, **[*15]** the resulting decision may only be reversed if there has been an abuse of that discretion. Sears Mortgage Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74 (1993). It is implicit in the exercise of equitable discretion that "'conscientious judgment [must be] directed by law and reason and [be] looking to a just result.'" State v. Madan, 366 N.J. Super. 98, 109-10, 840 A.2d 874 (App. Div. 2004) (quoting Wasserstein v. Swern & Co., 84 N.J. Super. 1, 6, 200 A.2d 783 (App. Div.), certif. denied, 43 N.J. 125, 202 A.2d 700 (1964)).

Our role is not to determine "whether the trial [judge] took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the [trial judge]. The question is only whether the trial judge pursue[d] a manifestly unjust course." Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523, 528, 670 A.2d 19 (App. Div.) (citation and internal quotation marks omitted), certif. denied, 144 N.J. 174, 675 A.2d 1122 (1996). In making such a determination, we employ an abuse of discretion standard, meaning that "[a] trial [judge]'s rulings on discretionary decisions are entitled to deference and will not be reversed on appeal absent a showing of an abuse of discretion involving a clear error in judgment." In re Estate of Hope, 390 N.J. Super. 533, 541, 916 A.2d 469 (App. Div.), certif. denied, 191 N.J. 316, 923 A.2d 231 (2007).

To make out a prima facie case of equitable fraud, there must be "(1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." Liebling v. Garden State Indem., 337 N.J. Super. 447, 453, 767 A.2d 515 (App. Div.) (citing Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624, 432 A.2d 521 (1981)), certif. denied, 169 N.J. 606, 782 A.2d 424 (2001). However, **[*16]** in contrast to legal fraud, "there need not be proof that the statement was made with knowledge that it was false," ibid., and thus, there is no need to prove "knowledge of the falsity and an intention to obtain an undue advantage therefrom," Jewish Ctr., supra, 86 N.J. at 624-25. Further, "[t]he elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom, are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud." Id. at 625 (citations omitted). In fact, "[e]ven an innocent misrepresentation can constitute equitable fraud justifying rescission." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 635, 651 A.2d 92 (1995). The elements of equitable fraud must be proven by clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395, 565 A.2d 1133 (App. Div. 1989), certif. denied, 121 N.J. 607, 583 A.2d 309 (1990).

In Dalton I, supra, 2012 N.J. Super. Unpub. LEXIS 874 at *15, we held that plaintiffs had demonstrated a prime facie case of equitable fraud. We have not changed our view on that issue. In his oral decision, the trial judge concluded that Maderich knew, after the closing, that there was reason to believe there was a leak in the tank. She had been so advised by Kirstein, who recommended emptying the tank and replacing it with aboveground tanks in the basement. Rather than disclose the information to the Daltons, which could have jeopardized the sale, the **[*17]** Shanna Lynn

defendants chose to assume the expense of emptying the tank and replacing it, as recommended by Kirstein. But, they also chose not to inform the Daltons that oil might have leaked from the tank into the ground. We find no error in the judge's conclusion that their course of conduct, specifically the failure to disclose the fact that there was reason to believe there had been an oil leak, constituted equitable fraud.

Given our standard of review, we reject the Daltons' argument that the judge erred in finding that there was no knowledge of the leak prior to the closing, as well as the assertion of the Shanna Lynn defendants that there was no factual basis for a finding of equitable fraud at all. The judge's factual findings were firmly based in the record and his legal conclusion was consistent with applicable law as outlined above. We also note the judge's reliance on *Hernig*, which supports his decision.

In addition, we reject the Shanna Lynn defendants' argument that there was no proof of reasonable reliance, which is required for a finding of equitable fraud. *Daibo v. Kirsch, 316 N.J. Super. 580, 588, 720 A.2d 994 (App. Div. 1998)* (citing *Jewish Ctr., supra, 86 N.J. at 625*); *DSK Enter., Inc. v. United Jersey Bank, 189 N.J. Super. 242, 251, 459 A.2d 1201 (App. Div.), certif. denied, 94 N.J. 598, 468 A.2d 232 (1983)*. That the Daltons chose not to exercise their right to perform an environmental inspection **[*18]** of the property and the oil tank does not negate their reliance on the contractual representations made with respect to the property. They had every right to rely on those representations. While it is true that the Daltons could have asked why the Shanna Lynn defendants replaced the oil tank, it is equally true that those defendants could have voluntarily explained their reasons. A defendant cannot claim that a plaintiff should have been more astute in discovering the fraud. *Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332, 342, 382 A.2d 933 (App. Div.), aff'd, 78 N.J. 320, 394 A.2d 360 (1978)*.

As we held in *Dalton I, supra, 2012 N.J. Super. Unpub. LEXIS 874 at *21*, "[a] court may decline to impose an equitable remedy if such relief is neither realistic nor fair." We added that, in this case, "rescission was neither realistic nor fair," explaining that the

> [t]ransfer of ownership of the real property and the business known as the Rainbow Inn occurred in 1988. Eighteen years had elapsed between the closing and conclusion of trial. There had been substantial performance of the agreement of sale. Moreover, when plaintiffs elected in 1997 to proceed with construction rather than to investigate the extent of the spill, they took action that rendered remediation of the site more difficult and perhaps more extensive and expensive. Neither party could be restored to **[*19]** the positions they occupied in 1988.
>
> [*2012 N.J. Super. Unpub. LEXIS 874 at *22*.]

As the judge observed, the oil leak did not prevent the Daltons from running their business.

> The fact that the oil hasn't negated the ability of the [p]laintiff[s] to operate the premises, they have been able to exercise the ability to run the bar, and they've got the liquor license, and there's nothing to say that there was an impediment on that, or to be able to use the property at this point in time, there's really no evidence upon which I can find that the case supports the theory of recoupment.

We agree, and find no abuse of the judge's discretion in reaching the decision not to undo the sale of the property.

Instead, the judge concluded that requiring the Shanna Lynn defendants to "pick up [part of] the bill" for costs of the investigation and clean-up was the more appropriate remedy because the Daltons were "entitled to get the property into a position that was equal to what they had expected at the time of settlement." We are satisfied that this was a "conscientious judgment" based on law and reason that is entitled to deference. *See Madan, supra, 366 N.J. Super. at 109-10* (quoting *Wasserstein, supra, 84 N.J. Super. at 6*). We also consider the judge's decision to require both sides to share the financial burden to be factually **[*20]** supported in the record, appropriate, and certainly not an abuse of discretion.

The Shanna Lynn defendants correctly argue that we determined in *Dalton I, supra, 2012 N.J. Super. Unpub. LEXIS 874 at *22*, that a constructive trust[4] and an

---

[4] "A constructive trust is an appropriate remedy to redress a 'wrongful act' that results in 'unjust enrichment.'" *Thompson v. City of Atl. City, 190 N.J. 359, 371, 921 A.2d 427 (2007)* (citation omitted). "[I]t will be imposed when a person has acquired possession of or title to property under circumstances which, in good conscience, will not allow the property's retention." *Thompson v. City of Atl. City, 386 N.J. Super. 359, 375-76, 901 A.2d 428 (App. Div. 2006), aff'd as modified, Thompson, supra, 190 N.J. at 386*. The remedy would convert the recipient into a trustee and require that he account for the property in whatever manner the court deems fair and just. *Id. at 376*.

accounting[5] were not appropriate in the context of this case. The trial judge took a different approach to those remedies. In effect, rather than invalidating the sale, he gave the Daltons a lien on the assets of the Shanna Lynn defendants to ensure that there will be sufficient assets to fund his equitable remedy. We had not considered such an approach and, consequently, our holding did not, in itself, bar it.

Had the issue of the leak been raised at or shortly after the closing, one possible remedy would have been to escrow some or all of the proceeds of the sale pending resolution of the problem. Such a repair or remediation escrow is common in real estate transactions. We view the remedy imposed by the judge to be the functional equivalent of such an escrow. It would be inequitable, however, to tie up more of the Shanna Lynn defendants' assets than are needed to fund the remedy. Consequently, the trial judge should entertain any application by the Shanna Lynn defendants to quantify, as best as possible, the reasonably anticipated expenses so that the constructive trust serves its appropriate purpose, without causing unwarranted harm to the Shanna Lynn defendants.

We have reviewed the parties' **[*22]** remaining arguments in light of the record and applicable law, and find them to be without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*. We add only that, with respect to counsel fees, we conclude that this case is covered by the American Rule, under which all litigants bear their own attorney's fees. *Gerhardt v. Continental Ins. Cos., 48 N.J. 291, 301, 225 A.2d 328 (1966)*. We find no merit in the Daltons' arguments to the contrary.

Affirmed.

End of Document

[5] Accounting is an equitable remedy normally used in situations involving commercial properties whereby a possessing tenant accounts **[*21]** to a non-possessing co-tenant for any rents the tenant received for use of the property. *Newman v. Chase, 70 N.J. 254, 266-67, 359 A.2d 474 (1976)*. The remedy can also be used in the context of "wrongful acts." In *Wear-Ever Aluminum, Inc. v. Townecraft Industries, Inc., 75 N.J. Super. 135, 150-51, 182 A.2d 387 (Ch. Div. 1962)*, the defendant was ordered to account to the plaintiff for its deliberate pirating of the plaintiff's employees. The defendant was required to pay the plaintiff for the training costs of the pirated employees as well as replacement employees. *Id. at 150*.

Deforest Inv. Co., LLC v. Cushman & Wakefield of N.J., Inc., 2012 N.J. Super. Unpub. LEXIS 75

Copy Citation

Superior Court of New Jersey, Appellate Division

February 16, 2011, Argued; January 12, 2012, Decided

DOCKET NO. A-3467-09T2

Reporter
2012 N.J. Super. Unpub. LEXIS 75 * | 2012 WL 87013

DEFOREST INVESTMENT CO., LLC, Plaintiff-Appellant, v. CUSHMAN & WAKEFIELD OF NEW JERSEY, INC., Defendant-Respondent.

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, Morris County, Docket No. L-722-09.

Counsel: Arthur L. Raynes argued the cause for appellant (Wiley Malehorn Sirota & Raynes, attorneys; Mr. Raynes, of counsel; Carolyn R. Conway, on the brief).

Lawrence C. Weiner argued the cause for respondent (Wilentz, Goldman, & Spitzer, P.A., attorneys; Mr. Weiner, on the brief).

Judges: Before Judges Fuentes, Ashrafi and Nugent.

Opinion

PER CURIAM

This dispute involves the timing of payment of a real estate commission owed by the seller, plaintiff DeForest Investment Co., LLC (DeForest), to its commercial real estate broker, defendant Cushman & Wakefield of New Jersey, Inc., (Cushman). DeForest appeals from three Law Division orders. The first and second orders, entered on March 26, 2010, denied DeForest's summary judgment motion for a declaration that it was obligated only to pay the commission in installments, and granted Cushman's summary judgment motion on its counterclaim seeking payment of its commission in a lump sum. The third order, entered on May 24, 2010, awarded Cushman contractual attorneys' fees and costs. We affirm.

I.

In November 2007, DeForest and Cushman entered into an "Exclusive Sales Agency Contract" [*2] (the Agency Contract) in which DeForest appointed Cushman its sole agent and granted to Cushman the exclusive right to sell property DeForest owned in East Hanover, New Jersey (the Property). Before signing the Agency Contract, the parties exchanged drafts. The parties agreed that Cushman's commission would be three and one-half percent of the total sales price, but did not agree immediately about how the sales price would be computed or when the commission would be paid. Cushman submitted to DeForest a proposal which included the following "Time of Payment" and "Computation of Sales Price" clauses:

TIME OF PAYMENT

The commission shall be earned, due and payable in full at the time of the closing or transfer of title to the property and not otherwise except, in the case of an installment purchase contract, in which case, the commission shall be earned, due and payable in full at the time of the execution and delivery of the installment purchase contract by and between the seller and the purchaser.

[]*COMPUTATION OF SALES PRICE*

The commission shall be computed in accordance with the above rates based upon the total sales price, which shall include any mortgages, loans or other obligations [*3] of the seller which may be assumed by the purchaser or which the purchaser takes title "subject to", any purchase money loans or mortgages taken back by the seller, the sales price of any fixtures or other personal property sold by separate agreement between the seller and purchaser as part of the overall sale of the real property, and the current market value of any other real or personal property transferred from the purchaser to the seller as part of the sale.

DeForest responded with a counter-proposal that included the following changes:

TIME OF PAYMENT

The commission shall be earned, due and payable in full *at the time DeForest . . . receives payment from the Seller* I *for the Property.* ~~at the time of the closing or transfer of title to the property and not otherwise, except,~~ In the case of an installment purchase contract, *[Cushman] will earn a portion of its commission with each payment received by the Seller. For example, in the event of an installment sale which calls for ten equal payments, [Cushman] will earn one tenth[] of its total commission simultaneous with DeForest['s] . . . receipt of each equal payment.* ~~in which case, the commission shall be earned, due and payable in full~~ [*4] ~~at the time of the execution and delivery of the installment purchase contract by and between the seller and the purchaser~~.

DeForest's counter-proposal also included a change in the manner in which the sales price would be computed. DeForest proposed, among other things, to decrease the total sales price by the "cost . . . of any insurance policy or environmental remediation that is a condition to, or a necessary prerequisite to the sale of the Property"; and to delete from Cushman's "Computation of Sales Price" clause the inclusion of "any mortgages, loans or other obligations of the seller which may be assumed by the purchaser or which the purchaser takes title 'subject to', [and] any purchase money loans or mortgages taken back by the seller."

The relevant clauses in the Agency Contract executed by the parties provided:

TIME OF PAYMENT

The commission shall be earned, due and payable in full at the time DeForest . . . receives payment from the Seller for the Property. In the case of an installment purchase contract, [Cushman] will earn a portion of its commission [*5] with each payment received by the Seller. For example, in the event of an installment sale which calls for ten equal payments, [Cushman] will earn one tenth of its total commission simultaneous with DeForest['s] . . . receipt of each equal payment.

[]*COMPUTATION OF SALES PRICE*

The commission shall be computed in accordance with the above rates based upon the total sales price which shall include any mortgages, loans or other obligations of the seller which may be assumed by the purchaser or which the purchaser takes title "subject to", any purchase money loans or mortgages taken back by the seller, the sales price of any fixtures or other personal property sold by separate agreement between the seller and purchaser as part of the overall sale of the real property, and the current market value of any other real or personal property transferred from the purchaser to the seller as part of the sale. The total sales price or commission due hereunder shall not be increased or decreased based upon the value, if any, assigned to the

existing lease on the Property. The total sales price shall be decreased by the cost to DeForest of any insurance policy or environmental remediation that is a condition [*6] to, or a prerequisite to the sale of the Property.

Cushman produced a buyer for the property. On August 18, 2008, DeForest and Commerce Park Investors II, L.L.C. (Commerce) executed a "Contract for Sale of Real Estate" (the Real Estate Contract) in which Commerce agreed to purchase the property for $12,500,000. The Real Estate Contract required Commerce to deposit $350,000 and pay the balance of the purchase price at closing. Four days later, on August 22, 2008, DeForest and Cushman executed an addendum to the Agency Contract, which provided that DeForest would escrow $1,000,000 for environmental issues and that Cushman would be paid a commission based upon the $11,500,000 received by DeForest at closing.

Meanwhile, DeForest and Commerce negotiated an addendum to the Real Estate Contract because Commerce could not pay the cash balance due at closing. During the negotiations, Commerce offered to have DeForest retain title to the property while Commerce made installment payments. DeForest rejected that offer, and on February 10, 2009, DeForest and Commerce revised the Real Estate Contract by executing an addendum that provided in part:

At the Closing, Buyer shall pay cash to the Buyer [sic] [*7] in an amount equal to the difference between $2.5 million and the amount of the Deposit, subject to closing adjustments. The Deposit shall be released to the Seller at Closing. The Seller shall not be paid in cash for the balance of the Purchase Price, but shall receive a promise from the Buyer to pay the Seller in the form of a Note . . . to be executed at closing.

DeForest subsequently attempted to renegotiate the Agency Contract to provide that Cushman would receive percentages of its commission as DeForest received monthly cash payments from Commerce on the purchase money mortgage. Cushman refused to modify the Agency Contract.

At the closing on February 10, 2009, DeForest transferred title of the Property to Commerce subject to the purchase money mortgage, but refused to pay Cushman its full commission on the $11,500,000 (the $12,500,000 sales price less the $1,000,000 environmental escrow). DeForest claimed that the transaction with Commerce was an installment sale and therefore Cushman was not entitled to a commission on the money due under Commerce's note until the note matured.

On March 4, 2009, DeForest filed a declaratory judgment action seeking a declaration that the balance [*8] of Cushman's commission was payable when the purchase money mortgage note matured. Cushman counterclaimed and sought a declaration that its commission was due when DeForest received payment, regardless of the form of payment.

The parties filed cross-motions for summary judgment. On March 26, 2010, the trial court granted Cushman's summary judgment motion and entered judgment in Cushman's favor for a commission of $402,500 (three and one-half percent of $11,500,000).

The trial court found that the "Computation of Sales Price" and "Time of Payment" clauses in the Agency Contract were unambiguous. The court determined that the clauses "[e]ssentially . . . stand for the proposition that when [DeForest] divested itself of either all its interest or a portion of it, at that point [Cushman] was to be paid." The court explained, "if it's an installment sale, they retain title over time and the commission is paid over time, as the land is being transferred."

On May 24, 2010, the trial court granted Cushman's application for counsel fees, relying on a provision in the Agency Contract that provided if "either party shall commence litigation against the other party to enforce its rights under [the [*9] Agency Contract], the party prevailing in such litigation shall be entitled to recover from the other party the costs and expenses (including attorneys' fees) thereby incurred." The court declined to award pre-judgment interest.

II.

DeForest first contends that because the parties agreed in the Agency Contract that Cushman's commission would be paid when DeForest received payment, rather than at closing or transfer of title as had been proposed during negotiations, the trial court erred in its decision. DeForest also contends that the term "receives payment," in the context of the Agency Contract, means actual payment of money rather than a promise to pay. DeForest maintains that the example in the Agency Contract of an installment sale is illustrative of the commission being paid upon receipt of cash payments by DeForest. Finally, DeForest argues that if the Agency Contract is ambiguous, this matter should be remanded to the trial court for a hearing.

Cushman responds that the meaning of the Agency Contract is clear and the trial court correctly determined the term "payment" is not limited to receipt of cash or money, but includes whatever DeForest received as consideration for conveying [*10] the property to Commerce.

We begin with our standard of review and the well-known principles of contract construction. A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R.4:46-2(c); *see also* Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 (1995). When reviewing summary judgment orders, we employ the same standard that governs trial courts. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div.), *certif. denied*, 154 N.J. 608, 713 A.2d 499 (1998).

The "[i]nterpretation and construction of a contract is a matter of law for the court subject to *de novo* review." Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420, 707 A.2d 209 (App. Div. 1998). When a court construes a contract, its "role is to consider what is 'written in the context of the circumstances' at the time of drafting and to apply 'a rational meaning in keeping with the expressed general purpose.'" Sachau v. Sachau, 206 N.J. 1, 5-6, 17 A.3d 793 (2011) [*11] (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302, 96 A.2d 652 (1953)). In addition to the contractual language and "the circumstances leading up to the formation of the contract," courts may also consider "custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221, 405 A.2d 393 (1979).

If the "terms of a contract are clear, the court must enforce them as written." E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc., 365 N.J. Super. 120, 125, 838 A.2d 494 (App. Div. 2004). It is not the court's function "to make a better contract for . . . the parties." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43, 161 A.2d 717 (1960); *see also* E. Brunswick, *supra*, 365 N.J. Super. at 125. However, a "court will, if possible, give effect to all parts of the instrument, and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." Maryland Cas. Co. v. Hansen-Jensen, Inc., 15 N.J. Super. 20, 27, 83 A.2d 1 (App. Div. 1951). Accordingly, the court may determine that those terms the parties excluded from the contract were intentionally excluded. Gabel v. Manetto, 177 N.J. Super. 460, 464, 427 A.2d 71 (App. Div. 1981) [*12] ("An affirmative expression ordinarily implies a negation of any other alternative. *Expressio unius est exclusio alterius.*"), *certif. dismissed*, 91 N.J. 270, 450 A.2d 582 (1982).

Our scope of review includes deciding whether a term is clear or ambiguous. Nester v. O'Donnell, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App. Div. 1997). "If the terms of the contract are susceptible to at least two reasonable alternative interpretations, an ambiguity exists." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238, 948 A.2d 1285 (2008). Nonetheless, in deciding whether contract terms are ambiguous, "[t]he court should examine the document as a whole and the court should not torture the language of [a contract] to create ambiguity." Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191, 814 A.2d 1108 (App. Div. 2002) (internal quotation marks and citations omitted).

"If contract terms are unspecific or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties." Hall v. Bd. of Educ., 125 N.J. 299, 305, 593 A.2d 304 (1991). On the other hand, "[a]bsent ambiguity, the intention of the parties is to be ascertained by the language of the contract." CSFB 2001-CP-4 Princeton Park Corporate Ctr., LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 120, 980 A.2d 1 (App. Div. 2009).

With [*13] these principles in mind, we disagree with DeForest's contention that Cushman is not entitled to its commission until DeForest receives payments from Commerce on the note.

The Agency Contract specifies that Cushman's commission will be computed "based upon the total sales price which shall include any . . . purchase money loans or mortgages taken back by the Seller[.]" The Agency Contract also specifies that Cushman's commission "shall be earned, due and payable *in full* at the time DeForest . . . receives payment from the Seller for the Property." (Emphasis added). That clause does not suggest that the "payment" DeForest "receives" must be in the form of cash, and DeForest does not argue that payment by means of a promissory note to close a commercial real estate transaction is unacceptable or not customary. When considered in the context of the entire Agency Contract, the term payment is unambiguous.

Our interpretation of the Agency Contract is in accordance with the longstanding legal principle that

the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the [*14] owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract.

[*Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 551, 236 A.2d 843 (1967).]

At closing, DeForest divested itself of title to the Property and received in exchange cash, a promissory note secured by a mortgage, and an unconditional personal guarantee; precisely what it had ultimately bargained for with Commerce. DeForest conveyed title and "received payment," though not entirely in cash, and Cushman's commission was therefore "payable in full."

DeForest could have negotiated a clause providing that in all instances in which it did not receive full payment of the purchase price in cash at closing, Cushman would receive partial payments toward its commission only as DeForest received cash payments from Commerce. Instead, the Agency Contract provided that Cushman would receive its commission in installment payments only "in the case of an installment purchase contract."

DeForest's reliance on *Joyce v. Stafford*, 72 N.J. Super. 596, 179 A.2d 86 (Law Div. 1962), *aff'd o.b.*, 78 N.J. Super. 256, 188 A.2d 310 (App. Div. 1963) is misplaced. The broker in *Joyce* agreed that its commission would not be due **[*15]** at closing, but instead would be due on "the gross amount of *money received, as received*[.]" *Id.* at 602. Unlike the present case, the agreement in *Joyce* explicitly conditioned payment of the commission on the seller's receipt of money, and specified that the broker's commission would be due when money was received and as it was received. Here, the Agency Contract did not specify that Cushman's commission was due when money was received. Instead, the Agency Contract stated that the commission was due when payment was received.

Accepting DeForest's interpretation of the Agency Contract would require a strained interpretation of its terms and would result in a better contract for DeForest than the one it negotiated with Cushman. Courts will not make a better contract for the parties. *Kampf, supra*, 33 N.J. at 43.

DeForest also contends the trial court erred in awarding Cushman attorneys' fees and costs. DeForest does not dispute that paragraph nine of the Agency Contract provided that in the event either party commenced litigation, the prevailing party would be entitled to costs and expenses, including attorneys' fees. Rather, DeForest argues that Cushman's fee application violated the procedural **[*16]** requirement of *Rule* 4:42-9(d)and the substantive requirements of *Rule* 4:42-9(b). We are not persuaded by Cushman's arguments.

Rule 4:42-9(d) states that an "allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination." To comply with the rule's language, a final judgment should not be submitted to the court by a prevailing party until that party has filed a fee application. *See Ricci v. Corporate Express of the E., Inc.*, 344 N.J. Super. 39, 48, 779 A.2d 1114 (App. Div. 2001), *certif. denied*, 171 N.J. 42, 791 A.2d 220 (2002). Nonetheless, we recognize that motions, including summary judgment motions, *see Rule* 1:6-1, must be accompanied by a proposed form of order. *R.* 1:6-2. We also recognize that "no application for attorney's fees [can be] made until the trial judge determine[s] which party [will] prevail." *Ricci, supra*, 344 N.J. Super. at 48. Obviously, an attorney cannot submit a completed fee application with a proposed summary judgment order when the attorney does not know how much time will be spent on an action between the date a motion is filed and the date it is decided.

For those and other reasons, we have interpreted *Rule* 4:42-9(d) to require **[*17]** that a fee application be made no later than the time for filing a motion to alter or amend a judgment under *Rule* 4:49-2. *Ricci, supra*, 344 N.J. Super. at 48. *Rule* 4:49-2 presently requires that such a motion be filed "not later than 20 days after service of the judgment" upon all parties. In this case, Cushman filed its fee application within twenty days of the court's filing of the summary judgment order. The order granting summary judgment to Cushman was signed and filed on March 26, 2010. Cushman's application for fees and costs was dated April 9, 2010.[2] Accordingly, we reject DeForest's argument that the fee application was untimely.

Finally, DeForest argues that Cushman's fee application did not comply with *Rule* 4:42-9(b), which states that a fee application shall "be supported by an affidavit of services addressing the factors enumerated by [*Rule of Professional Conduct (RPC)*] 1.5(a) **[*18]**."[3] The trial judge rejected that argument, explaining:

The Court notes that this matter had proceeded from complaint through discovery, through mediation and depositions to the point of substantive motions and decisions. The Court finds that the hourly rate submitted given the level of experience and the total hours provided are reasonable and necessary,

In [entering judgment against the plaintiff], the Court acknowledges that the Affidavit of Services was not in full compliance with *R.* 4:42-9(d). It does, however, find that the information provided to the Court substantially complies with said Rule, as well as RPC 1.5[(a)] and provided a sufficient basis for the Court to view the reasonableness and necessity of the fees.

Although the affidavits Cushman submitted in support of its fee application did not explicitly address the factors listed in *RPC* 1.5(a), the trial judge determined that Cushman substantially complied with that rule. The documents Cushman submitted in support of the application enabled the trial judge to evaluate those factors and the reasonableness of the fee. For example, "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," *RPC* 1.5(a)(1), were evident from the detailed, itemized billing records submitted by Cushman and from the summary judgment motion record and oral argument. "[T]he amount involved and the results obtained," *RPC* 1.5(a)(4), were also evident from those records.

DeForest does not dispute on appeal, and apparently did **[*20]** not dispute in the proceedings before the trial judge, either the reasonableness of the hourly rates charged by Cushman's attorneys or the time spent on the matters itemized in the billing records. More significantly, DeForest does not attempt to point out which of the eight factors enumerated in *RPC* 1.5 are not implicitly addressed in Cushman's fee application. Under those circumstances, we find no error in the trial judge's fee and cost award to Cushman.

Having said that, we emphasize that the better practice is to include explicit references to the *RPC* 1.5 factors in an affidavit supporting a fee application. Doing so avoids the risk that a fee award will be reversed for non-compliance with *Rule* 4:42-9(b).

Affirmed.

Footnotes

- [1↩]

  The parties do not dispute that the use of the term "Seller" was a typographical error and that the term "Buyer" was understood.

- [2↩]

  In the procedural history section of its appeal brief, DeForest does not dispute that Cushman's fee application was filed "on or about April 9, 2010." Cushman states in its appeal brief that it filed its application on April 12, 2009. Under either circumstance, Cushman filed the fee application within the required twenty-day period.

- [3↩]

  RPC 1.5(a) lists eight factors to be evaluated in determining the reasonableness of a fee: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for **[*19]** similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

EXHIBIT C

I/M/O the Verified Petition of Jersey Central Power & Light Company For Approval of the Sale and Conveyance of Certain Portions of its Property in the Borough of Allenhurst, Monmouth County, New Jersey and the Granting and Transfer of Certain Easements in Connection Therewith Pursuant to N.J.S.A. 48:3-7 and N.J.A.C. 14:1-5.6

BPU Docket No. EM18020193

RESPONSE TO DISCOVERY REQUEST

RCR-25 Please describe how the Company will account for the proceeds from the sale of the Property on its books and records at the time of final settlement, including the share of costs to be allocated to ratepayers and environmental remediation costs.

Response: The *pro forma* journal entries provided in the Company's response to RCR-42, at RCR-42 Attachment 1, will be adjusted to reflect the actual proceeds resulting from final settlement of the sale.