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ANN BRADLEY and KATHERINE RUDNICK, as Co-Executors of THE ESTATE OF LAWRENCE A. CARTON III, Plaintiffs-Appellants, v. JOSEPH KOVELESKY and KOVE CONSTRUCTION COMPANY, INC., and GTL INVESTMENTS, L.P. and JJR REALTY CAPITAL GROUP, LLC, Defendants, and JOSEPH KOVELESKY and KOVE CONSTRUCTION COMPANY, INC., Defendants/Third-Party Plaintiffs-Respondents, v. TOMMASO IADEVAIA & SONS CONTRACTING COMPANY, INC., Third-Party Defendant-Respondent.

DOCKET NO. A-0423-14T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2016 N.J. Super. Unpub. LEXIS 1898

January 13, 2016, Submitted
August 15, 2016, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.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, Monmouth County, Docket No. L-2955-12.

COUNSEL: Law Office of Howard Davis, P.C., attorneys for appellants (Mr. Davis, of counsel; Anne Ronan and Justin M. Davidson, on the briefs).

Dilworth Paxson LLP, attorneys for respondents Joseph Kovelesky and Kove Construction Company (Joseph A. Clark, of counsel and on the brief).

Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for respondent Tommaso Iadevaia & Sons Contracting Company, Inc. (Jacob S. Grouser, of counsel and on the brief).

JUDGES: Before Judges Ostrer, Haas and Manahan.

OPINION

PER CURIAM

Plaintiffs Ann Bradley and Katherine Rudnick, as co-executors of the Estate of Lawrence Carton, appeal from the summary judgment dismissal of their complaint seeking various forms of relief under environmental statutes and the common law for pollution of a property purchased by the late Lawrence Carton. We affirm in part, and reverse in part.

I.

We discern the following facts from the record, extending all favorable inferences to plaintiffs as the non-movants. *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)*.

This appeal pertains to an 8.3-acre property in Middletown Township that Carton purchased on January 18, 2006. Sometime thereafter, he began building [*2] a residence on the property.[1] Work stopped after the Department of Environmental Protection (DEP) issued violation notices in September 2006, alleging solid waste and land use violations. Carton retained environmental consultants, who reported in February 2007 that soil and groundwater contained excess concentrations of benzo(a)pyrene, arsenic, and other contaminants. The consultants opined the pollution was "probably due to the promiscuous dumping of asphalt material . . . ."

1 Plaintiffs' attorney certified that Carton intended to use the house himself, but the attorney lacked personal knowledge for that assertion. *See R. 1:6-6*.

Carton died on June 1, 2007. In 2009, the estate hired another consultant to perform additional soil sam-

pling and remediation activities. In around June 2010, the consultant began to excavate and dispose contaminated soil. Remediation activities continued into 2012.

On July 11, 2012, Bradley and Rudnick, Carton's wife and daughter, in their role as co-executors of Carton's estate,[2] sued the property's prior owners: Kove Construction Company, Inc. (Kove), which owned the property from 1973 to 1999; GTL Investments, L.P. (GTL), which owned it next; and JJR Realty Capital [*3] Group, LLC (JJR), the last owner before Carton. Plaintiffs also named Kove's president and sole shareholder, Joseph Kovelesky.[3]

2 Although the record does not disclose the current status of Carton's estate, we presume the estate is still open, inasmuch as the property remains in Carton's name, according to public records. *See N.J.R.E. 202(b)*; *N.J.R.E. 201*.

3 The complaint against GTL and JJR was eventually dismissed for failure to prosecute.

Plaintiffs alleged that defendants caused the contamination on the property. Counts one and two sought contribution toward remediation costs and an order compelling defendants to remediate. Count one was a claim for contribution under the Spill Compensation and Control Act (Spill Act), *N.J.S.A. 58:10-23.11f.* Count two asserted violations of the Brownfield and Contaminated Site Remediation Act, *N.J.S.A. 58:10B-1.3* (BCSRA), the Site Remediation Reform Act, *N.J.S.A. 58:10C-28* (SRRA), and the Spill Act. The remaining four counts asserted claims of strict liability, negligence, trespass, and nuisance, for which plaintiffs sought compensatory damages, contribution and indemnification, declaratory relief, abatement of the nuisance, and attorney fees and costs.

In their October 2012 answer, Kove and Kovelesky (collectively, "Kove") denied that [*4] they discharged hazardous substances on the property. Kove also filed a third-party complaint against Tommaso Iadevaia & Sons Contracting Company Inc. (Iadevaia), which alleged that Iadevaia polluted the property in 1971 while constructing a public sanitary sewer improvement. Iadevaia filed a counter-claim against Kove. Both Kove and Iadevaia asserted affirmative defenses of statute of limitations, laches, and unclean hands. Plaintiffs never filed a direct claim against Iadevaia.

On February 6, 2014, Kove filed a motion for summary judgment. Kove argued that the Spill Act contribution claim and common law claims were time-barred under *N.J.S.A. 2A:14-1*, which establishes a six-year limitations period. Kove contended that the claims accrued in 2004 when Carton, as the Middletown planning board attorney, became aware of environmental issues on the property. Kove cited a development application proceeding from 2004, in which the planning board expressed concern about fill material on the property. Kove also asserted plaintiffs lacked a private right of action for the statutory relief sought under count two, and had failed to serve on DEP a notice of claim in accordance with the Environmental Rights Act [*5] (ERA), *N.J.S.A. 2A:35A-1 to-14*. Iadevaia supported Kove's motion.

On February 14, 2014, plaintiffs served a thirty-day notice of intent to commence an ERA action on DEP. On March 12, 2014, plaintiffs filed a motion to amend the complaint to add an ERA claim against Kove, premised on the Spill Act, BCSRA, and SRRA violations asserted in count two of the original complaint.

Plaintiffs also filed opposition to Kove's summary judgment motion, arguing that the Spill Act contribution claim was not subject to a statute of limitations defense. They also contended the common law claims were not time-barred, arguing that, under the discovery rule, Carton did not discover a basis for the claims until February 2007. Plaintiffs also argued that summary judgment was premature because discovery was incomplete. The discovery end date was September 30, 2014. The record indicates that, although plaintiffs had served deposition notices and discovery requests on defendants, no discovery occurred. The discovery requests are not in the record.

In its June 6, 2014 oral decision, the trial court found that the Spill Act contribution claim and common law claims were time-barred. Relying on our decision in *Morristown Associates v. Grant Oil Co., 432 N.J. Super. 287, 74 A.3d 968 (App. Div. 2013)* (*Morristown I*), *rev'd* [*6] , *220 N.J. 360, 106 A.3d 1176 (2015)* (*Morristown II*), the court held that the Spill Act contribution claim was subject to the same six-year statute of limitations under *N.J.S.A. 2A:14-1* that governed the common law claims. The court held the limitations period began to run more than six years before the complaint was filed, because Carton became aware of environmental problems on the property in 2004.

The court characterized count two as an ERA claim, and dismissed the count because plaintiffs failed to serve notice on DEP before filing the original complaint. The court also denied the motion to amend the complaint, reasoning that plaintiffs could not cure the failure to serve advance notice on DEP by filing an amended complaint. The court thereafter denied reconsideration of the order denying the motion to amend.

II.

Plaintiffs raise four issues on appeal. The first pertains to the timeliness of their Spill Act contribution

claim. After the June 6, 2014 summary judgment decision, the Supreme Court rendered its decision in *Morristown II, supra*, vindicating plaintiffs' position that this claim is not subject to a statute of limitations defense. *220 N.J. at 364* ("Based on the plain language of the Spill Act, reinforced by its legislative history, we hold that *N.J.S.A. 2A:14-1*'s six-year [*7] statute of limitations is not applicable to Spill Act contribution claims."). Faced with the Court's clear declaration, defendants now argue that dismissal was nonetheless appropriate based on principles of laches and unclean hands.

The remaining three issues presented are whether the common law claims are time-barred; whether the statutory claims in count two were properly dismissed; and whether the court erred in denying plaintiffs' motion to amend to add an ERA claim.

We review these questions de novo, as they are purely legal issues. *Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378, 658 A.2d 1230 (1995)*; *see also Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330, 9 A.3d 882 (2010)* (appellate court reviews summary judgment de novo, applying the same standard as the trial court); *Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 325, 903 A.2d 1103 (App. Div.)* (whether a cause of action is barred by a statute of limitations is a legal question that is reviewed de novo), *certif. denied, 188 N.J. 577, 911 A.2d 69 (2006)*.

III.

A.

Starting with the Spill Act contribution claim, *Morristown II* forecloses defendants' argument that this claim is subject to equitable defenses. Defendants' position is at odds with the Court's holding that the enumerated defenses in *N.J.S.A. 58:10-23.11g(d)* are exclusive:

> [W]hile the contribution provision does not explicitly state that no statute of limitations applies, it does state that "[a] contribution defendant shall have *only* the defenses [*8] to liability available to parties pursuant to [*N.J.S.A. 58:10-23.11g(d)*]." *N.J.S.A. 58:10-23.11f(a)(2)(a)* (emphasis added). The language of the statute expressly restricting the defenses available under the Spill Act provides significant support for a conclusion that no statute of limitations applies. The Spill Act's incorporation of the defenses enumerated in *N.J.S.A. 58:10-23.11g(d)* limits defendants to the following defenses: 'an act or omission caused solely by war, sabotage, or God, or a combination thereof.' That list does not include a statute of limitations defense.
>
> [*Id. at 381*.][4]

4 The Spill Act contains several other defenses to liability, *N.J.S.A. 58:10-23.11g(d)(2)-(5)*, which the *Morristown II* Court did not discuss and are not at issue here.

Just as the exclusive list of defenses precludes a statute of limitations defense, it precludes equitable defenses of laches or unclean hands. "The 'only defenses' available to contribution claims were to be the ones to which the Legislature specifically referred." *Id. at 382*; *see also id. at 384* (noting the "specific legislative intent to eliminate other otherwise available defenses"). Further, the Court's concern that fact-sensitive discovery rule disputes would complicate resolution of Spill Act claims also militates against allowing a laches defense. *See id. at 384*. A prerequisite [*9] to applying laches is the plaintiff's awareness of his or her rights to assert a claim. *See Donnelly v. Ritzendollar, 14 N.J. 96, 108, 101 A.2d 1 (1953)* ("a person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights.") (quoting *Scheel v. Jacobson, 112 N.J. Eq. 265, 269, 164 A. 270 (E. & A. 1933))*. Thus, as with the statute of limitations, application of laches requires an inquiry into when the plaintiff discovered the facts supporting a cause of action.

Defendants' remaining arguments in support of the dismissal of the Spill Act contribution claim lack sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

B.

Turning to the common law claims, plaintiffs argue that under the discovery rule, the limitations period did not begin to run until Carton became aware of the contamination in February 2007. Applying *N.J.S.A. 2A:14-1*'s six-year statute of limitations, they contend their July 2012 complaint was timely. They argue that the documentary evidence pertaining to the 2004 planning board action at most shows that Carton was aware of improper filling of wetlands, but not contamination by hazardous chemicals. Plaintiffs also contend summary judgment was premature, as they had not completed discovery.

We need not reach these issues, however, as plaintiffs' strict [*10] liability, negligence, and trespass claims are time-barred for a different reason.[5] Plaintiffs

asserted these claims on behalf of Carton's estate. Consequently, the claims are survival actions, which are governed by the two-year limitations period contained in *N.J.S.A. 2A:15-3*.

> 5 *See State v. Heisler, 422 N.J. Super. 399, 416, 29 A.3d 320 (App. Div. 2011)* (stating an appellate court is "free to affirm the trial court's decision on grounds different from those relied upon by the trial court").

N.J.S.A. 2A:15-3 provides: "Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living." The statute preserves the right of action a deceased would have had for damages to his person or property. *See Aronberg v. Tolbert, 207 N.J. 587, 593, 25 A.3d 1121 (2011)*. It abrogates the common-law prohibition of claims brought on behalf of deceased parties for injuries to, among other things, the deceased's real property. *Canino v. New York News, Inc., 96 N.J. 189, 191-95, 475 A.2d 528 (1984)*; *Soden v. Trenton & Mercer Cty. Traction Corp., 101 N.J.L. 393, 395-96, 127 A. 558 (E. & A. 1925)*. The word "trespass" in *N.J.S.A. 2A:15-3* is broadly construed to include all torts generally. *Canino, supra, 96 N.J. at 194-95*.

A survival action under *N.J.S.A. 2A:15-3* must be brought within two years of the decedent's death. The statute was amended in 2010 to incorporate the two-year limitations period that governs [*11] wrongful death actions under *N.J.S.A. 2A:31-3*. *See L.* 2009, *c.* 266, §1. The amended statute provides: "Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter," except in certain cases where the decedent was a victim of homicide. *N.J.S.A. 2A:15-3*.[6] The amendment applies to "any action pending or filed on or after the effective date" of January 17, 2010. *L.* 2009, *c.* 266, § 2.

> 6 We recognize that the Legislature's apparent intent in adding the two-year time bar to *N.J.S.A. 2A:15-3* was to toll the statute for personal injury actions in cases of homicide. Senate Judiciary Committee, *Statement to Senate Bill No. 2763* (May 18, 2009). Nonetheless, we are bound by the plain language of the statute, which imposes a two-year period on "[e]very action." *See In Re Kollman, 210 N.J. 557, 568, 46 A.3d 1247 (2012)*.

Accordingly, plaintiffs were required to file their complaint by June 2009, two years after Carton's death, "and not thereafter." Even if we were to assume that the limitations period was tolled until the executors' discovery of the basis for a cause of action, that occurred in 2009, more than two years before the May 2012 filing. In sum, the strict liability, negligence and trespass claims are time-barred under *N.J.S.A. 2A:15-3*.

We reach a different [*12] result with respect to the nuisance claim, which alleges a continuing failure to remediate the contamination. In essence, plaintiffs allege a continuing nuisance, which is a continuing tort. *See Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 102-03, 675 A.2d 1077 (1996)* (discussing distinction between continuing and permanent nuisance). Therefore, the cause of action continually accrues, triggering a new limitations period each day the nuisance is not abated. *Id. at 99, 104*. Accordingly, the nuisance claim is not time-barred.

C.

Finally, we consider together the dismissal of the claim for various forms of statutory relief in count two, and the denial of the motion to amend to add an ERA claim.

We affirm the dismissal of count two, to the extent it relies on *BCSRA* and *SRRA*. Count two sought an order declaring Kove liable under the Spill Act as a "discharger or person in any way responsible for a hazardous substance" and requiring Kove to remediate and fund the remediation pursuant to BCSRA, SRRA, and DEP regulations. Plaintiffs provide no authority for a private right of action under BCSRA and SRRA, and we are aware of none. To the extent count two relies on the Spill Act, it is duplicative of count one; we have already held that the Spill Act contribution claim was not subject [*13] to dismissal.

We reverse the denial of plaintiffs' motion to amend to add an ERA claim. The ERA grants private persons standing to sue for violations of environmental statutes:

> Any person may commence a civil action in a court of competent jurisdiction against any other person *alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment*. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance, or to assess civil penalties for the violation as provided by law. *The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute*, regulation or ordinance, *and that*

> *there is a likelihood that the violation will recur in the future*.
>
> [*N.J.S.A. 2A:35A-4(a)* (emphasis added).]

The "ERA does not itself provide any substantive cause of action." *Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 58, 522 A.2d 1025 (App. Div. 1987)*.

The ERA "was passed primarily to insure access to the courts by all persons interested in abating or preventing environmental damage." *Howell Twp. v. Waste Disposal Inc., 207 N.J. Super. 80, 93, 504 A.2d 19 (App. Div. 1987)* (citing *N.J.S.A. 2A:35A-2*). The Act may also be used "to challenge inadequate enforcement of environmental laws by an agency." *In re N.J. Pinelands Comm'n Resolution, 356 N.J. Super. 363, 375, 812 A.2d 1113 (App. Div.), certif.* [*14] *denied, 176 N.J. 281, 822 A.2d 610 (2003)*.

As a prerequisite to suit, a plaintiff must serve written notice of his or her intent to assert a claim under the ERA on DEP and other public officials. *N.J.S.A. 2A:35A-11*. The notice must be served "at least 30 days prior to" commencing the action. *Ibid.* This requirement enables DEP to determine its approach to the litigation, including whether it will join the litigation, whether its expertise would assist the court, and whether the litigation risks undermining "broad state interests." *Howell, supra, 207 N.J. Super. at 95*.

The trial court read *N.J.S.A. 2A:35A-11* to require plaintiffs to serve notice before filing the original complaint, reasoning that count two was actually an ERA claim. We disagree. A plaintiff is required to give notice of any "action . . . commenced pursuant to this act." *N.J.S.A. 2A:35A-11*. The notice requirement was not triggered until plaintiffs asserted a claim "pursuant to this act," which was when they filed their motion to amend on March 12, 2014. The original complaint made no mention of the ERA, and thus was not an "action . . . commenced pursuant to [ERA]." Nothing in the ERA states that an ERA claim may only be asserted in the original complaint. Because plaintiffs served notice on DEP on February 14, 2014, they satisfied the thirty-day [*15] notice requirement.

The decision whether to grant leave to amend a complaint rests within the trial court's discretion. *Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457, 713 A.2d 411 (1998)* (citing *R. 4:9-1*). Although leave "shall be freely given in the interest of justice," *R. 4:9-1*, the court may deny leave if the amendment would unduly delay the litigation or cause undue prejudice to a party. *Kernan, supra, 154 N.J. at 457* (internal citations omitted). Here, there is no indication in the record that the amendment would cause delay or prejudice.

A court may also deny leave if the amendment would be "futile," meaning the proposed claim "is not sustainable as a matter of law." *Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511, 58 A.3d 690 (2013)* (internal quotation marks and citations omitted). The trial court found the proposed ERA claim was futile because it alleged only past environmental violations. We disagree. Plaintiffs alleged that Kove has a continuing duty to remediate under BCSRA, *see N.J.S.A. 58:10B-1.3(a)* (stating that discharger of or "person in any way responsible for a hazardous substance" "shall remediate the discharge of a hazardous substance.") They alleged that Kove has not and currently is not conducting remediation, and thus is in continuous violation of BCSRA. Plaintiffs further alleged that if Kove's failure to remediate continues in the future, it will remain in [*16] violation of BCSRA. Accordingly, plaintiffs alleged a continuous or intermittent environmental violation, which is likely to "recur in the future." *N.J.S.A. 2A:35A-4(a)*.[7]

> 7 We reject Kove's argument that it cannot be in continuous violation of environmental laws because it no longer owns the property. If Kove is a discharger or "person in any way responsible," it has an ongoing obligation to remediate pursuant to *N.J.S.A. 58:10B-1.3(a)*.

In sum, we affirm the dismissal of the strict liability, negligence, and trespass claims, and of the BCSRA and SRRA claims in count two. We reverse the dismissal of the nuisance and Spill Act contribution claims and the denial of the motion to amend to add an ERA claim.

Affirmed in part. Reversed in part. We do not retain jurisdiction.

Bradley v. Kovelesky, 2016 N.J. Super. Unpub. LEXIS 1898 (App.Div. Aug. 15, 2016)

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SHEPARD'S SUMMARY

Unrestricted *Shepard's* Summary
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