N.J. Appellate Division Decision Underscores Need for a Hearing to Resolve Factual Disputes

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Authors:

Andrew T. Alessandro

On November 14, 2024, the New Jersey Appellate Division issued a decision in *Beazer East, Inc. v. Morris Kearny Associates Urban Renewal, LLC*, reversing the lower court which had ordered Defendant Morris Kearny Associates Urban Renewal, LLC ("Morris") to give access to its site in Kearny ("Site") to Plaintiff Beazer East Inc. ("Beazer") in order for Beazer to remediate contaminated groundwater at the Site pursuant to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.1 to -23.24, and the Hazardous Discharge Site Remediation Act, N.J.S.A. 58:10B-1 to -31.

Beazer had sought access to a portion of the Site to install two groundwater-monitoring wells. Morris denied the request, claiming that Beazer's installation of the wells would interfere with Morris' contractual obligation to construct site improvements and warehouses on its property in furtherance of a commercial redevelopment project. After subsequent negotiations to obtain access were unsuccessful, Beazer filed a summary action seeking access to the Site under the New Jersey Access Statute, N.J.S.A. 58:10B-16, which allows a remediating party to obtain a court order on an expedited basis permitting "reasonable access" to a property if "after good faith efforts, the person undertaking the remediation and the property owner fail to reach an agreement concerning access." N.J.S.A. 58:10B-16(a)(1).

In support of its order to show cause seeking the access order, Beazer submitted an affidavit from its Licensed Site Remediation Professional ("LSRP") explaining that both the redevelopment and remediation activities could occur simultaneously, based in part on the LSRP's past experience in such situations. In opposition, Morris submitted a conflicting affidavit from the vice president of a "consulting, engineering, and construction management firm," stating the wells could not be installed prior to the redevelopment construction because necessary "massive earth-moving" activities would render it impossible to protect the wells from damage.

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Following argument, the court entered an order allowing Beazer access to the Site to install the monitoring wells, finding that the redevelopment and remediation activities "can and should" be performed concurrently at the Site without interference by either party to the actions of the other at the Site.

Morris filed a motion for reconsideration of the court's order, arguing that the court had erroneously disregarded the vice-president's affidavit in making its determination that plaintiff's installation of the wells could occur simultaneous with defendant's construction and excavation on the property. After the court denied the motion for reconsideration, Morris appealed from that denial.

On appeal, the Appellate Division found the trial court erred in its issuance of the access order by resolving material factual disputes about the feasibility of the simultaneous activities based solely on the conflicting affidavits without holding a plenary hearing. The three-judge panel held that the court erred when it relied "more strongly on the opinion of the LSRP that in his experience the[] activities can co-exist . . . at the site." According to the panel, the court erroneously made a credibility determination and findings of fact by accepting Beazer's LSRP's opinion and version of the facts over the opinion and version presented in Morris' affidavit as a basis for the access order. It vacated the trial court's access order and remanded the case for further proceedings, including a hearing to resolve the factual disputes.

This decision, which has not been approved for publication, underscores the importance for courts to resolve material factual disputes at a plenary hearing when presented with competing affidavits. Courts must not resolve such disputes based solely on affidavits or written submissions. Access was not obtained properly in the summary proceeding as an evidentiary hearing was required to allow for proper fact-finding and credibility assessments.

The case also highlights how easily a dispute over access for remediation can devolve into lengthy litigation, undermining the purpose of a summary action and delaying remediation. In this case, Plaintiff asserted that its groundwater wells could not await

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completion of the Site owner's construction work and required that the remediation proceed concurrently. Over two years after the matter was filed, the issue is still unresolved and being remanded to the lower court to resolve the factual dispute, which may include discovery if appropriate and necessary.

Gibbons will continue to monitor and report developments in environmental law throughout New Jersey.

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