

## **SELLER'S FAILURE TO DISCLOSE ENVIRONMENTAL CLEANUP ACTIONABLE, EVEN FOR "AS IS" SALE**

On August 18, 2016, a New Jersey appellate court ruled that a property **seller's failure to disclose environmental contamination and cleanup could expose the seller to liability for fraud**. In [\*Catena v. Raytheon Co.\*](#), the Appellate Division reversed a trial court's decision which had granted summary judgment based on the statute of limitations. The Appellate Division found that the "discovery rule" applied to claims asserting fraud and that Catena, the purchaser of commercial property, was not time barred in his lawsuit which was brought more than a decade after his purchase. **The "discovery rule" delays the commencement of the limitations period, i.e., a plaintiff's claim does not accrue until the plaintiff discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an action claim. In a real estate setting, intentional nondisclosure of a material defect which is not observable by a Buyer can give rise to a finding of fraud by the Seller and the statute of limitations will not bar a suit many years after the sale if the Buyer, after appropriate due diligence, had no reason to know of the defect.**

In this case, the Seller, individually or through his partnership, owned the property since 1983. When the Seller defaulted on its mortgage in 1987, Seller's mortgage lender ("Lender") took possession of the property and began making efforts for its sale. Lender engaged a consultant to take soil samples; it was discovered that the property was contaminated with perchloroethylene ("PCE"). In June 1988, the Lender and Seller arranged for the excavation and removal of the known contaminated soil. The environmental consultant specifically warned that it could not guarantee that all the contaminated soil had been removed. Neither the Lender, the Seller, nor the environmental consultant notified the New Jersey Department of Environmental Protection ("NJDEP") of the contamination.

Catena entered into a contract to purchase the property "as is" later in June 1988. There were no representations or warranties made by the Seller. On the day before the closing, the Lender provided Catena's attorney with a 1987 affidavit submitted to the NJDEP which stated that, on information and belief, the only occupants on the site had been a dry wall construction contractor, a bank, and a trucking concern, and that they had not engaged in operations which involved hazardous substances. This form affidavit was commonly used in the 1980s to demonstrate the non-applicability of the Environmental Cleanup Responsibility Act ("ECRA"), a statute that required remediation prior to property transfers in certain circumstances. The Seller also provided Catena with a copy of the 1988 affidavit

that Seller submitted to the NJDEP which included the same information as the Lender's affidavit. This later submission was to confirm that the sale to Catena was not subject to ECRA. Neither affidavit mentioned the discovery of contamination or the soil removal that had been undertaken.

After the closing of title in November 1988, Catena retained a consultant to perform an environmental assessment which found that the past uses of the property were far more extensive than those stated in the affidavits, including production of aircraft parts, assembly of mechanical electrical parts, a textile knitting and dyeing operation, the manufacture of prefabricated exterior building facades, and a distribution center for screen-printing inks and related supplies. These prior uses would likely have caused the sale to Catena to require compliance with the ECRA statute. The Assessment recommended that Catena investigate the possible presence of contamination, but Catena did not investigate. Instead, nearly ten years later when Catena sought to refinance the property, his prospective lender hired a consultant to conduct an investigation. That investigation found PCE contamination, which it reported to the NJDEP. The consultant opined that the likely cause of the contamination was the historical use of the property in airplane-related industries.

Beginning in 1998, Catena proceeded with a robust but intermittent investigation of his property. In the early 2000s, groundwater and stream contamination was discovered.

Catena sued the Seller, and the prior owners and operators of the property, including those who likely caused the PCE contamination, pursuant to the NJ Spill Act. Through discovery in the litigation, Catena obtained reports and communications between the Seller and the Lender concerning the partial cleanup of soil that they had performed but did not tell him about. Catena amended his complaint to assert claims of common law fraud and violations of the Consumer Fraud Act against the Seller and Lender. Catena testified at his deposition that he did not know of the contamination before his purchase and admitted that he did not ask the Seller or Lender whether there were any environmental issues. He also did not investigate the past uses of the property prior to the purchase.

The Seller and Lender moved for summary judgment with regard to the fraud claims, alleging that more than six years (the statute of limitations for fraud claims) had passed since these claims accrued. The trial court agreed with the Seller, finding that Catena should have been aware of the fraud when he entered into an administrative agreement with the NJDEP in June 1998 to conduct the

investigation of his property. Catena appealed, arguing that the fraud was not discovered until December 2007 during Seller's deposition.

The Appellate Division reversed the trial court's ruling and found that even though Catena learned of the contamination in the late 1980s, he wasn't aware (and could not have become aware) of the fraud until he learned of it in discovery. **The court explained the importance and general acceptance of the discovery rule in cases involving fraud: the victim's lack of awareness of the fraud is the wrongdoer's very object. The rule thus prevents the wrongdoer from benefiting from his own deceit.**

The court concluded that when Catena first became aware of contamination, he had no reason to believe that the Seller or the Lender knew about these site conditions. They had not made any representations and their affidavits to NJDEP did not show any suspicious prior users (which were only required to be identified back to 1984). Indeed, Catena's consultant concluded that the contamination was caused by "airplane related industries" and none of the prior users in the Seller's and Lender's affidavits were involved in that industry.

Moreover, Catena would not have learned about the partial cleanup by conducting a public records search, as the contamination and remediation was not reported to NJDEP. Thus, there was no evidence that a more diligent pre-suit investigation would have led to the information about the fraud.

Given these facts, the court concluded that the fraud and Consumer Fraud Act claims were not time barred. The court made clear that **the application of the discovery rule is fact and case sensitive and requires a careful analysis of when the purchaser became aware of facts that would alert a reasonable person to the possibility of an actionable claim.**

The inescapable conclusion for real estate sellers is that they will face viable claims by purchasers years after a sale if sellers fail to disclose known environmental conditions and remediation activities even in "as is" sale transactions with no affirmative representations or warranties.