

## Coal Tar/Property Damage Action: New Jersey Appellate Court Addresses Statute of Limitations Issue



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The Appellate Division of the Superior Court of New Jersey (“Court”) addressed in a June 20th opinion several issues associated with a landowner’s lawsuit alleging damages caused by coal tar originating from an adjacent property. See *320 Associates, LLC v. New Jersey Natural Gas Co.*, No. A-1831-16T2, 2018 WL 3189466 (N.J. Super. June 29, 2018).

320 Associates, LLC (“320”) asserted that coal tar pollution on New Jersey Natural Gas’s (“NJNG”) property resulted in the migration of coal tar plumes (“Migration”) onto its property.

The Court affirmed and remanded parts of the Superior Court of New Jersey’s ruling in favor of NJNG against 320. The lower court’s decision to dismiss certain 320 claims because of the expiration of the six-year statute of limitations was upheld. However, it found that the trial court acted prematurely in dismissing 320’s nuisance claims against NJNG for failing to remediate 320’s property for pollution.

320 claimed it first learned of the Migration in 2008 when testing its property following remediation of contamination from leaking underground storage tanks on its property. It claimed that the coal tar contamination prevented it from selling the property to its current commercial tenant. In an effort to mitigate damages, the company stated it was forced to extend the tenant’s lease through 2023. 320 further asserted that the pollution from NJNG’s property had significantly decreased the value of its land and affected its ability to sell or lease the property in the future.

NJNG received a work plan in 2011 for the cleanup of both NJNG’s and 320’s property. 320 indicated that the remediation project was to commence on 320’s property in spring 2015. However, by 2016, NJNG had not yet undertaken any cleanup on 320’s property.

Based on the lack of remediation, 320 alleged causes of action against NJNG for negligence, per se negligence, strict liability, violation of the Spill Act, violations of the New Jersey Environmental Rights Act, nuisance, and trespass. Damages were sought for the lost sale or rental value of its property and injunctive relief requiring NJNG to remediate the pollution on both parties’ property.

The Court reviewed NJNG’s motion to dismiss and 320’s response. It noted that the remediation process may have been stalled due to 320’s insistence on retaining its right to pursue damages for loss of value to its property as a condition of allowing NJNG to enter its property to perform cleanup services. In addition, in its motion to dismiss, NJNG produced documents showing that 320 received a remedial investigation work plan prepared by Environmental Evaluation Group in 2003 and a proposal from Brinkerhoff

Environmental Services, Inc. in 2006 addressing contaminated soil on 320's property. This was stated to be an indication that 320 likely knew of the pollution on its property.

The Court dismissed 320's claims for permanent diminution in the value of its property, holding they were untimely. 320's claim was based on a permanent loss in the value of its land due to the Migration of coal tar contaminants from NJNG's property that it arguably first became aware of in 2003 or 2006. The Court viewed the evidence in the light more favorable to 320. Regardless, it determined that the latest 320 could have learned about the condition of its property was 2008 (the year it tested its property for pollution). Because the applicable statute of limitation is six years for tortious injury to real property, the damages claims based of permanent diminution expired, at the latest, in 2014.

320 argued that, under the Spill Act, Migration constitutes a new "discharge" of pollutants with each occurrence. The Court rejected this argument. It stated that the discharge occurred decades ago and the Migration of those pollutants onto 320's property did not constitute new discharges.

The Court sided with 320 on its nuisance claim insofar as it requested the Court to require NJNG to complete the remediation of its property and 320's property. Citing the New Jersey Supreme Court, the Court noted that if a nuisance can be abated, the failure to do so constitutes a continuing tort that would entitle 320 to relief. Generally, if the nuisance cannot be abated, the statute of limitation starts to run upon the creation of the harmful condition; however, under the discovery rule, the statute of limitation might be tolled until the plaintiff discovers the harm.

As such, to the extent 320 claims that its property, along with NJNG's property, can be remediated, the Court determined it has the right to pursue its demand that NJNG commence remediation.

The Court remanded the case for the purpose of reinstating 320's nuisance claims and proceeding with discovery to determine if 320 is entitled to damages.

A [copy of the opinion](#) can be downloaded here.