

# Sale of Commercial Property: New Jersey Appellate Court Addresses Whether Remediation Contractor Owed Duty to Subsequent Property Owner



**Walter Wright, Jr.**

wwright@mwlaw.com

(501) 688.8839

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Co-Author: Catherine Norwood

The Superior Court of New Jersey, Appellate Division ("Court") addressed in a January 12th Opinion an issue relating to the environmental remediation of a commercial property. See *Sunway Equity, LLC v. Suburban Propane, LP*, 2022 WL 107992.

The questions addressed by the Court included whether a remediation contractor owed a duty to the subsequent owner/purchaser of a property on which it had undertaken work for a prior owner/seller.

Suburban Propane ("Suburban") hired remediation contractor JM Sorge, Inc. ("JMS") to remove three gasoline, propane, and diesel underground storage tanks ("USTs") on a portion of a 1.7 acre property ("Parcel"). The work involved soil remediation and groundwater sampling.

JMS's work was subject to New Jersey's Department of Environmental Protection ("DEP") regulatory oversight. It submitted several Reports and Remedial Action Plans detailing its findings and remediation efforts to DEP.

DEP issued in 1998 a No Further Action Letter ("NFA") to Suburban stating that JMS's efforts had been completed on the affected portion of the parcel. However, Suburban and its successors were required to monitor parcel groundwater for compliance with applicable standards.

Plaintiff Sunway Equity ("Sunway"), owned land neighboring the parcel. It bought the parcel from Suburban in 2000. Pursuant to the transaction, Suburban provided to Sunway both the JMS reports to the DEP and DEP's NFA.

The contract also provided Sunway the right to conduct soil, groundwater, engineering, and other tests on the parcel to determine if there were any remaining contaminants or hazardous materials. Sunway could opt out of the transaction if it:

. . . "reasonably determine[d] that the physical condition of the [property was] in any way contaminated with any hazardous substance."

Sunway never conducted tests of the property. Instead, it relied on JMS's Reports and the DEP NFA letter as to the condition of the property. It subsequently purchased the property. Ten years after acquiring the parcel, Sunway leased the parcel to a new tenant. The tenant found arsenic in the parcel's soil.

Sunway sued Suburban, JMS, and other parties for negligence and violation of the New Jersey Spill Compensation and Control Act.

The trial court granted JMS's summary judgment motion holding Sunway's claims were barred by the statute of limitations. Further, it held that even if Sunway had brought these claims before the statute of limitations has expired, it still would have granted JMS's summary judgment motion.

JMS was held to have no duty to Sunway.

The Court on appeal agreed with the trial court on both holdings. It found that Sunway brought its claims against JMS long after the statute of limitations had expired.

In terms of JMS's duty to Sunway, the Court held that JMS could have not reasonably foreseen that a subsequent purchaser of the parcel like Sunway would rely only on its reports to the DEP to confirm that the parcel did not have any outstanding environmental issues without conducting independent testing.

JMS was held to only have had the duty to turn over all its reports and files to Suburban. This would ensure that Suburban and subsequent owners of the land had all the information they needed about JMS's remedial efforts. It was the subsequent duty of Suburban, not JMS, to turn over JMS's reports and the NFA letter to subsequent owners of the parcel.

The Court referenced Sunway's lack of due diligence. It said that Sunway had both the time and opportunity to assess the parcel. Suburban and Sunway's contract provided Sunway an opportunity to opt out of the transaction if Sunway identified unacceptable contamination. Therefore, because Sunway never undertook an independent assessment it assumed the risk that hazardous materials and contaminants could be present.

The Court noted that Sunway had been Suburban's neighbor and knew that JMS's remediation efforts only covered a small part of the parcel. Sunway thus knew that JMS's reports would only address the environmental condition of part of the parcel. Further, Sunway knew that there were parts of the parcel that could still contain contaminants and hazardous materials. It therefore thus assumed the risk that there could be remaining contaminants.

The Court deemed it unfair for Sunway to benefit from its lack of due diligence by imposing a duty on JMS towards Sunway.

Therefore, JMS did not owe a duty to Sunway.

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