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*GRANTED

NORTH BRUNSWICK TOD ASSOCIATES, LLC, a New Jersey Limited Liability Corporation Plaintiff, v. VERIZON NEW JERSEY, INC., a New Jersey Corporation Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO: L-5443-17
NORTH BRUNSWICK TOD ASSOCIATES, LLC, a New Jersey Limited Liability Corporation Plaintiff, v. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a New Jersey Corporation Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO: L-5445-17 **ORDER**

THIS MATTER being opened to the Court by the Carlin & Ward, P.C. (James M. Turteltaub, Esq. appearing), counsel for Plaintiff North Brunswick TOD Associates, LLC ("NBTOD"), by way of Motion for Summary Judgment in the above captioned consolidated matters, and the Court having reviewed the moving papers and the opposition papers filed thereto, and the Court having conducted oral argument, and for good cause having been shown:

IT IS on this 27th day of December, 2019,

ORDERED that Plaintiff's Motion to Summary Judgment in the above captioned consolidated matters is hereby granted in favor of Plaintiff and against the Defendants, Public Service Electric and Gas Company ("PSE&G") and Verizon New Jersey, Inc. ("Verizon"); and

IT IS FURTHER ORDERED that NBTOD shall have no liability for the costs of relocating PSE&G's facilities and property which was the subject of, and otherwise addressed in, the September 12, 2012 Escrow Agreement between NBTOD and PSE&G, as amended by the August 28, 2013 Amendment ("PSE&G Escrow Agreement"); and

IT IS FURTHER ORDERED that the escrow agent under the PSE&G Escrow Agreement shall release the full escrowed amount under said agreement to NBTOD within 10 days; and

IT IS FURTHER ORDERED that NBTOD shall have no liability for the costs of relocating Verizon's facilities and property which was the subject of, and otherwise addressed in, the Escrow Agreement dated October 22, 2012 between NBTOD and Verizon ("Verizon Escrow Agreement"); and

IT IS FURTHER ORDERED that the escrow agent under the Verizon Escrow Agreement shall release the full escrowed amount under said agreement to NBTOD within 10 days; and

IT IS FURTHER ORDERED Verizon's Counterclaim as set forth in its Amended Answer dated May 21, 2019 is hereby dismissed with prejudice; and

IT IS FURTHER ORDERED that a copy of this Order shall be deemed served upon all parties when electronically filed via eCourts; and

IT IS FURTHER ORDERED that this Order closes this case.

DVN

HON. DENNIS V. NIEVES, J.S.C.

This Motion was:
_x_ Opposed
__ Unopposed

Oral argument heard on 12/06/19.

*Granted for the reasons set forth in the attached statement of reasons.

STATEMENT OF REASONS

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2(c). Under the Brill standard, in determining whether a genuine issue of material fact exists, the court must view the competent evidence presented in a light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). Evidence submitted in support of a motion for summary judgment must be admissible. Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995). "[U]nsubstantiated inferences and feelings" are not sufficient to support or defeat a motion for summary judgment. Petersen v. Twsh of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011). Moreover, "[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." Id.

The common law principle of cost allocation dictates that a utility company is required to bear the cost of relocating its facilities when the project necessitating the relocation benefited the public. Pine Belt Chevrolet v. Jersey Cent. Power & Light Co., 132 N.J. 564, 572 (1992). Utilities companies have been forced to pay relocation costs when the project was performed by a private entity acting the public interest. Id.

In Fellowship Bank v. Public Serv. Elec. & Gas Co., 158 N.J. Super. 107 (App. Div. 1977), as a condition of site plan approval to build a branch office, the bank was required to widen an adjourning road. The widening of the road required the relocation of utility poles. The Appellate Division held that the utility was responsible for the costs of relocating the poles because the project predominantly served the public interest, and not the bank's private interest. The court

relying on Port of N.Y. Auth. v. Hackensack Water Co., 41 N.J. 90 (1963), held that the utility's responsibility for the cost was the "price the utility company must pay for the privilege of location within a public right of way when the public welfare requires changes in the road which call for a relocation of facilities." Fellowship Bank, 158 N.J. Super. at 111.

The Court in Pine Belt Chevrolet reaffirmed the principles enunciated in Port Auth. of N.Y. and Fellowship Bank. Pine Belt, 132 N.J. at 572-73. "[T]he common law relieve[s] private-property owners of financial liability when the relocation of utility facilities is mandated by the public welfare." Id. at 586 (citing Port. Auth. of N.Y., 41 N.J. at 96-97). By contrast, "when [the] primary beneficiary of [a] project is [a] private property owner or developer, common law assigns utility-relocation costs to that owner or developer." Id. at 572 (citing In re Petition of Cinnaminson Props., Inc. v. Public Serv. Elec. & Gas Co., N.J. Bd. of Public Utils., Docket No. 736-431 (1974)).

Defendants rely on Cinnaminson to hold the Plaintiff liable for the relocation; asserting that the roadway improvement project primarily benefitted the Plaintiff. The Court disagrees. As noted by in Plaintiff's brief, in Cinnaminson, the utility relocation was required for the private developer to construct an acceleration and deceleration lane at the access point to its private shopping center to facilitate safe entry and exit from the site. The focus in Cinnaminson was not the nature of the developer's property, but the nature of the improvement that necessitated the relocation. An acceleration and deceleration lane undoubtably serve to only benefit the shopping center.

The Court distinguishes this instant matter from Cinnaminson and finds this situation more akin to the facts of Fellowship Bank. It is undisputed that the road improvement project was a condition set by North Brunswick in order for the Plaintiffs to rezone their property for

development. Therefore, the fact that the Plaintiff elected to redevelop their property, necessitating the rezoning, is irrelevant.

The Court focuses on the nature of the improvement that necessitated the relocation of the Defendants' utility facilities on the public right-of-way. It is undisputed that the road improvement project was designed to improve traffic flow. In addition to addressing increased traffic brought on by the private development, the road improvement project improved the pre-existing traffic congestion on the roadway. Said improvement does not solely benefit the Plaintiff, as seen in Cinnaminson. Instead, the improvement benefits both the Plaintiff and the motoring public at large, as seen in Fellowship Bank. Therefore, the Court finds that under the common law principle, the Defendants, as utilities, are liable for the costs of relocating facilities from the public right-of-way. Accordingly, Plaintiff's motion for summary judgment is granted and Defendants' cross-motion for summary judgment is denied.