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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1078-16T3

VERIZON NEW JERSEY, INC.,

Plaintiff-Respondent,

v.

J.F. KIELY CONSTRUCTION CO.,

Defendant-Appellant.

Submitted November 28, 2017 – Decided December 28, 2017

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-0069-15.

Law Offices of Gerard M. Green, attorneys for appellant (Kaitlin E. Ryan, on the briefs).

Andrew L. Salvatore, attorney for respondent.

PER CURIAM

Defendant J.F. Kiely Construction Co. appeals from a May 31, 2016 Law Division order granting summary judgment to plaintiff, Verizon New Jersey, Inc., finding defendant liable for negligence

and resulting damages. Defendant also argues the trial court erred in denying its cross-motion for summary judgment.

At the outset, we note this appeal is interlocutory because the trial court failed to make findings on damages. Nevertheless, the record demonstrates a genuine issue of material fact as to whether defendant's negligence caused damages to plaintiff. Therefore, we sua sponte grant leave to appeal nunc pro tunc the issue of defendant's liability under N.J.S.A. 48:2-82 only. R. 2:4-4(b)(2); see also Medcor, Inc. v. Finley, 179 N.J. Super. 142, 144-45 (App. Div. 1981) (holding this court has discretion on whether to grant leave to appeal an interlocutory order.). We vacate and remand for further proceedings.

I

To prevail on its negligence claim, a plaintiff must satisfy a three-part test: "(1) the existence of a duty; (2) the breach of that duty; and (3) proximate causation of damages." LaBracio Family P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155, 161 (App. Div. 2001).

The trial court may grant summary judgment only where legally competent evidence establishes that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J.

520, 540 (1995). The trial court cannot decide disputed factual issues, but must decide whether there are any factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). We review the trial court's decision de novo, employing the same standard. Ibid.

Significantly, in reviewing an appeal from a summary judgment motion, "we are obliged to view the facts in the light most favorable to the non-moving party." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010). Moreover, on occasion, a case will not be ripe for summary disposition even if both sides move for summary judgment. See Driscoll Constr. Co. v. State, Dep't of Transp., 371 N.J. Super. 304, 317-18 (App. Div. 2004). We have independently reviewed the record with these principles in mind.

II

To properly review defendant's assertions on appeal, we must examine provisions of the Underground Facility Protection Act (UFPA), N.J.S.A. 48:2-73 to -91, and regulations the Board of Public Utilities promulgated, N.J.A.C. 14:2-1.1 to -6.10, to implement UFPA. In 1994, the Legislature enacted UFPA "to protect both the public from the risk of harm and the utility companies from unnecessary losses." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 582 (2013). UFPA established a "One-Call

Damage Prevention System" to protect underground facilities (commonly referred to as pipes, mains, or lines) because these facilities are frequently "subject to accidental damage from excavating equipment and explosives." James Constr. Co. v. Bd. of Pub. Utils., 298 N.J. Super. 355, 360 (App. Div. 1997).

UFPA requires that before performing an excavation, an excavator[1] must "notify the [One-Call system] . . . of [its] intent to engage in excavation or demolition not less than three business days and not more than [ten] business days prior to the beginning of the excavation or demolition." N.J.S.A. 48:2-82(a). When an excavator notifies the One-Call system, the One-Call center informs the applicable underground facility operators of the pending excavation. See N.J.A.C. 14:2-4.2. Within three business days, operators are then required to mark out the facility, and must mark "the site within [eighteen] inches horizontally from the outside wall of the facility . . . ." N.J.S.A. 48:2-80. Generally, these mark outs are symbols spray-painted on the ground to show the location and characteristics of the underground utilities.

[1] N.J.A.C. 14:2-1.2 defines an excavator as "any person performing excavation or demolition." Neither party disputes defendant's obligation to comply with UFPA provisions.

In the event of a problem during excavation, the excavator "shall immediately report to the operator of an underground facility any damage to the underground facility caused by or discovered by the excavator in the course of an excavation or demolition." N.J.S.A. 48:2-82(e). The existence of "[e]vidence that an excavation . . . that results in any damage to an underground facility was performed without providing the notice required pursuant to [N.J.S.A. 48:2-82] . . . shall be prima facie evidence . . . that the damage was caused by negligence of the person engaged in the excavation . . . ." N.J.S.A. 48:2-89.

III

Plaintiff owns and operates underground cables, one of which is located in Egg Harbor Township, and is the subject of the instant action. On September 8, 2011, defendant struck plaintiff's underground cable as it "was digging to place a gas pipe."

Previously, on August 17, 2011, defendant notified the One-Call system of its intent to excavate, pursuant to N.J.S.A. 48:2-82. As provided in its One-Call ticket, defendant's start date was August 23, 2011, and its "Start[-]By" date was August 31, 2011. Accordingly, to comply with UFPA, the latest defendant could begin excavating was August 31, 2011.

Plaintiff asserts defendant began excavating after the ticket's Start-By date, thereby establishing prima facie evidence

of defendant's negligence. See N.J.S.A. 48:2-82(a) and 48:2-89. Defendant presents no evidence contradicting plaintiff's assertion, but merely argues plaintiff fails to definitively establish its excavation start date.

We agree the record establishes defendant began excavating outside of the One-Call ticket's Start-By date, in violation of N.J.S.A. 48:2-82(a). At his deposition, defendant's foreman, Michael Soriano, testified defendant began excavating on September 7, 2011 — one week after the One Call ticket's Start-By date. Soriano based his testimony upon his review and interpretation of defendant's own records. Therefore, Soriano's testimony constitutes an adoptive admission to which defendant failed to produce credible evidence to the contrary. See N.J.R.E. 803(b)(2); see also Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding to defeat a motion for summary judgment, the adverse party "must do more than simply show that there is some metaphysical doubt as to the material facts."). However, based on defendant's failure to begin excavating on or before its One Call ticket's Start-By date, the court should have only decided that plaintiff established a technical violation of UFPA constituting prima facie evidence of defendant's negligence.

While a finding that defendant violated N.J.S.A. 48:2-89 creates prima facie evidence of negligence, it does not

conclusively establish negligence in and of itself. See, e.g., Eaton v. Eaton, 119 N.J. 628, 637, 642-43 (1990) (citing Waterson v. Gen. Motors, 111 N.J. 238, 263 (1988)) (differentiating between "evidence of negligence and negligence itself," and holding "[o]rdinarily, the determination that a party has violated 'a statutory duty of care is not conclusive on the issue of negligence, it is a circumstance [that] the jury should consider in assessing liability.").

Here, as the trial judge noted in correctly denying defendant's cross-motion for summary judgment, the record reflects contradicting evidence as to plaintiff's mark out locations. Specifically, plaintiff's damage report indicates the mark outs were at twelve inches, defendant's damage report indicates the mark outs were at thirty inches, and plaintiff's underground facility locator, ECSM, reports the mark outs were at twenty-four inches. To wit: there remains a material question as to whether defendant negligently caused plaintiff's injury, notwithstanding defendant's failure to comply with the One-Call system's Start-By date.

Notably, if plaintiff or its underground facility locator provided inaccurate mark outs, a fact-finder could conclude that defendant likely would have damaged plaintiff's facility regardless of defendant's failure to comply with the One-Call

system's Start-By date. Therefore, by granting plaintiff summary judgment based solely on defendant's untimely excavation, the trial court erroneously imposed strict liability. The trial court erred in failing to determine whether plaintiff or its underground facility locator provided accurate mark outs – an issue that goes to the heart of proximate cause. A genuine factual dispute on that point would defeat summary judgment.

Finally, the trial court erred by failing to make findings on plaintiff's actual damages. Here, plaintiff claims its damages were $15,428.74. However, plaintiff failed to present evidence demonstrating how it arrived at that figure. As a result, the record lacks evidence sufficient to support a decision on this issue.

Accordingly, we vacate and remand for a determination whether defendant's conduct proximately caused plaintiff's damages, and if so, to make findings on the actual damages sustained.

Vacated and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION