

Order prepared by the court

HUDSON RIVER WATERFRONT
CONSERVANCY OF NEW JERSEY,

Plaintiff,

v.

THE ADMIRALS WALK
CONDOMINIUM ASSOCIATION, INC.,

Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

DOCKET No.: BER-C-184-22

CIVIL ACTION

ORDER

THIS MATTER having been opened to the court upon an application of a notice of motions filed by Scott B. Piekarsky, Esq., Phillips Nizer LLP, attorney for plaintiff, Hudson River Waterfront Conservancy of New Jersey, Inc., and cross-motion having been filed by John M. Van Dalen, Esq., Van Dalen Brower, L.L.C., attorney for defendant, The Admirals Walk Condominium Association, Inc., and the court having reviewed and considered the motion papers submitted, and for good cause having been shown,

IT IS on this 14th day of January, 2023,

ORDERED:

1. Plaintiff's motion for summary judgment is hereby **GRANTED IN PART**. See attached rider.
2. Defendant's cross-motion for summary judgment is hereby **DENIED**. See attached rider.
3. A copy of this order shall be served upon all parties appearing herein within seven days of the date hereof.



HON. LISA PEREZ FRISCIA, J.S.C.

**HUDSON RIVER WATERFRONT CONSERVANCY OF NEW
JERSEY, INC. V. THE ADMIRALS WALK CONDOMINIUM
ASSOCIATION**

Docket No. BER-C-184-22

RIDER TO ORDER DATED JANUARY 14, 2023

Plaintiff, Hudson River Waterfront Conservancy of New Jersey, Inc., (hereinafter “the Conservancy” or “plaintiff”), on November 23, 2022, filed the within motion for summary judgment. Defendant, the Admirals Walk Condominium Association, (hereinafter “Admirals,” “the Association” or “defendant”), filed a cross-motion for summary judgment, and opposition to plaintiff’s motion, on December 20, 2022. Plaintiff filed a reply on January 4, 2023. The court grants in part plaintiff’s motion and denies defendant’s cross-motion for the reasons set forth below.

The within matter arises out of a land use dispute under the public trust doctrine concerning defendant’s property and the Hudson River Waterfront Walkway, (hereinafter “the Walkway”). The Walkway is partially located in Edgewater, New Jersey and runs through multiple towns. Plaintiff is a registered New Jersey corporation with the vested purpose to protect and enforce the public’s right to free and unobstructed access to the Walkway.¹ President of the Conservancy, Donald Stitzenberg, (hereinafter “Mr. Stitzenberg”), by way of certification in support of the motion, dated November 23, 2022, addresses the role of the Conservancy, and sets forth:

4. The Conservancy acts as the “eyes and ears” of the DEP on the Hudson River Waterfront. The function of the Conservancy is to oversee the construction and maintenance of the Hudson River Waterfront Walkway (The Walkway). The Conservancy works with the DEP, local municipalities, residents, developers and property owners to ensure that the Walkway gets built according to the DEP Guidelines and is maintained in a safe and efficient manner. The

¹ It is undisputed by defendant that plaintiff has standing to bring the within action. Further, it is undisputed all discovery is complete, and the parties are proceeding on the discovery provided subject to argument, except for the objection to the certification of Mr. Sullivan. As it was maintained, same is not provided.

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Board meets 4 times per year with the DEP to discuss The Walkway, including unbuilt sections of the Walkway and seek actions to complete the missing sections. These include communications with property owners and developers, assessing development plans, suggesting enforcement actions to the DEP, advising residents on the use of the Walkway, bringing enforcement actions against violators and seeking fording methods to complete unfinished sections of the Walkway.

[Stitzenberg Cert.]

The Walkway, authorized pursuant to N.J.A.C. 7:7-9.46, is a popular open recreational path along the Hudson River Waterfront, which is used for transportation, recreation, education, science, aesthetic, spiritual and other purposes. Defendant is a New Jersey corporation which operates a high-rise condominium Complex on private property, (hereinafter “the Association property”), located on the shore of the Hudson River at Block 33 and Lots 1N, 1S, and 2 in Edgewater, New Jersey. The Association property spans 8.8-acres and is closed to the public, which presents a 900 foot barrier to achieving a contiguous passage of the Walkway. The parties stipulate opening the passageway to the public will not make the walkway contiguous, but the adjacent property may be improved to be contiguous.

On October 10, 2022, plaintiff filed the two-count complaint, alleging violation of the public trust doctrine in excluding the public from formerly flowed tidelands (count one) and violation of the public trust doctrine in favoring its residents’ access to the tidal area over the public’s ability to access (count two). On November 21, 2022, defendant filed an answer and counterclaim, claiming the requirement of public access onto the Association’s private property would result in a taking of private property without just compensation.

Mr. Stitzenberg, the Conservancy president, sets forth his understanding of the history of the Hudson River Waterfront as follows:

6. During the 1970's the Hudson River Waterfront was an unsafe and dangerous place as it was composed of abandoned and decaying industrial sites and railyards. By 1995[,] when I moved to the Waterfront, commercial and residential redevelopment of the waterfront was well underway. As each successive property was redeveloped an additional section of the walkway was added. Gradually these segments of the Walkway joined up to create a contiguous Walkway path used not only by residents of Waterfront Communities but by members of the public from across New Jersey. As development of The Gold Coast proceeded[,] parks and other recreational facilities were built attracting more of the public to the waterfront.

[Stitzenberg Cert.]

It is undisputed the Walkway presently provides approximately an 18.5-mile pathway along the Hudson River Waterfront from Bayonne, New Jersey to Fort Lee, New Jersey. (Pl. Compl. ¶ 3). It has been acknowledged the properties recently developed, and now fronting the Hudson River between the George Washington Bridge and the Bayonne Bridge, are required to construct a section of the Walkway and subsequently give access to the public.

Mr. Stitzenberg certifies to the obstacle, inconvenience, and danger the Association poses by restricting access to their portion of the Walkway as it requires the public to traverse near the roadway. Specifically, Mr. Stitzenberg avers, and it is not disputed, pedestrians are forced to take an alternate route around the Association property when traveling along the walkway. It is argued the necessity to travel on the sidewalk on River Road is a safety hazard and concern. Mr. Stitzenberg sets forth:

10. Admiral's Walk Condominiums are located between the Edgewater Marina, a major public transportation terminal, and Edgewater Veterans Park, the primary public park for citizens of Edgewater. To the south, the Walkway is completely constructed in Edgewater Marina and dead ends at the Admirals Walk property line where Walkway users must detour to dangerous River Road to bypass Admiral's Walk. On the north side of the Admirers Walk waterfront there is about 50 feet of property owned by Waterside Condominiums which directly abuts the completed Walkway in Edgewater Veteran's Park.

[Id.]

Similarly, the vice-president of the Conservancy, Ron Klempner, (hereinafter “Mr. Klempner”), by way of certification, dated November 23, 2022, avers his observations sets forth:

11. I noticed that Admiral's Walk created an obstacle when travelling between the Marina and the Park almost as soon as I moved to Edgewater in 2006, during my daily running. I run to the northern end of the Edgewater Marine, then am forced to turn West along a narrow path for about 325', often littered with obstacles of power lines linking power sources to boats on trailers. Then I must run along a narrow sidewalk in front of Admiral's Walk and Waterside Condominiums a distance of over 1/5 of a mile, crossing three driveways until arriving at the Veteran's Park—what is more, the sidewalk in places is obstructed by various signs, hydrants and other street furniture. The sidewalk is exposed to noise and traffic along River Road, often causing me to move aside to accommodate other pedestrian users. When jogging in front of Admiral's Walk one morning and faced with mothers running with their children to catch a school bus stopped at Edgewater Marina (which Admiral's Walk does not allow to pick up within Admiral's Walk) while pushing a stroller with their younger children, I was forced to detour into River Road itself.

12. On several occasions, when I tried to gain access through the front driveway entrance at Admiral's Walk, I was stopped at the guardhouse and told that without authorization to enter I would be deemed a trespasser and subject to law enforcement measures.

13. By allowing access through Admiral's Walk, and eventually Waterside Condominiums, I and others would be able to avoid the above described detour between the Marina and the Park and avoid the congestion, noise, traffic and obstacles described above.

[Klempner Cert.]

In plaintiff's motion for summary judgment, plaintiff provides a certification of Michael F. Sullivan, ASLA, AICP, (hereinafter “Mr. Sullivan”), as to an evaluation of the Edgewater, New Jersey shoreline and its changes over time. Mr. Sullivan certifies he is a professional planner and licensed landscape architect, licensed by the State of New Jersey, and is a member of the American Institute of Certified Planners. (Sullivan Cert.). Additionally, Mr. Sullivan certifies he is a

principal at Clarke Caton Hintz, PC, (hereinafter “CCH”), and has been employed by CCH since 1998.²

It is undisputed the Association property has been privately owned since 1931. (Pl. Ex. 1). In 1931, a Tidelands Conveyance occurred between the New Jersey Board of Commerce and Navigation, and Public Service Electric and Gas, (hereinafter “PSE&G”). The property title was transferred to PSE&G for \$252,780. Id. The conveyance described the Association property as bordering the Former Mean High Water Line, which followed the riverward edge of River Road. Id. Additionally, the Tidelands Conveyance assigned to PSE&G, and its successors and assigns, the tract of land now or formerly flowed by tidewater.

Both Mr. Stitzenberg and Mr. Kempner allege to have attempted to contact the Association and its representatives to come to a solution on the matter. Mr. Stitzenberg states he, personally, with the Conservancy, has tried to contact the Association to discuss opening the Waterfront to the public numerous times since 2016. (Stitzenberg Cert.). In 2019, following the threat of legal action, representatives from the Conservancy, including Mr. Klempler, and the Association met and discussed opening the Association’s portion of the Walkway to the public. Id.

In a separate but related matter, Hudson River Waterfront Conservancy of New Jersey, Inc. v. The Admiral’s Walk Condominium Association, Docket No. BER-C-52-20, plaintiff litigated seeking similar relief under the public trust doctrine, but plaintiff voluntarily dismissed the complaint by way of consent order and pursuant to memorandum of understanding, dated January 6, 2021. The order set forth in pertinent part:

WHEREAS, HRWC has initiated a suit captioned Hudson River Waterfront Conservancy of New Jersey, Inc. v. The Admiral’s Walk Condominium Association, Docket No. BER-C-52-20 (the

² The court does not consider the certification as defendant disputes service during discovery. Discovery is warranted and must be reopened to ensure no prejudice.

“Action”) in the Superior Court of New Jersey, Chancery Division, Bergen County alleging that that the Association has violated the Public Trust Doctrine; and,

WHEREAS, the Association has denied that it has violated the Public Trust Doctrine; and,

WHEREAS, individuals and entities affiliated with River-Lookout Associates, LLC (hereinafter “River-Lookout”) are obligated to pay certain funds to satisfy a Settlement Agreement with the New Jersey Department of Environmental Protection (hereinafter “DEP”) and seeks to do so as efficiently as possible while maximizing the benefit to residents of Edgewater Borough (“Offset Proposal”); and,

WHEREAS, the Parties (HRWC, the Association, and River-Lookout) believe that an opportunity exists to resolve these disputes if River-Lookout, subject to DEP approval, funded the construction of the Hudson River Walkway (hereinafter “Walkway”) from the municipal park to the north of the Association to the Marina located to the south of the Association instead of paying a fine or portion of a fine to the DEP; and,

....

WHEREAS, the proposed Walkway would utilize a portion of the Association’s waterfront property; and

WHEREAS, the proposed construction will include improvements to the Association’s waterfront areas; and

WHEREAS, the Board has the authority to enter into this MOU with the understanding amongst the parties that it must seek the approval of the Association’s Unit Owners before entering into a binding agreement to have the Walkway constructed on its property; and,

WHEREAS, the parties have an understanding that while there is an intention to attempt to settle this matter in good faith, there are several contingencies that must be met prior to the construction of the Walkway, including obtaining the aforementioned approval of the Association’s Unit Owners and various governmental approvals....

[Van Dalen Cert.]

While the parties agree discovery was conducted and the parties entered into the memorandum of understanding to resolve the issues, no settlement resolution was ever reached.

On October 3, 2022, plaintiff thereafter moved to restore the matter under Docket No. BER-C-52-20. On October 4, 2022, the Honorable James J. DeLuca, J.S.C. denied to restore the matter and ordered plaintiff to file a new complaint.

In the within motion, plaintiff argues there exists no material issue of fact as defendant has barred the public from lands affronting tidal waters which are protected under the public trust doctrine. It is argued defendant violates the public trust doctrine by blocking public access to state tidelands. Plaintiff asserts the foundational case Arnold v. Mundy, 6 N.J.L. 1 (1821) is controlling here. Specifically, plaintiff contends while the Association possesses an interest in the land at issue, it cannot legally exclude the public from its use. Additionally, plaintiff argues, pursuant to N.J.S.A. 13:1D-150(b), the Association is statutorily forbidden from excluding the public from New Jersey tidelands and the adjacent shoreline. It is argued there exists two limitations to the doctrine, where there exists either a critical habitat area or threatened and endangered species, or where free public access would present a national security risk, and neither applies here. Plaintiff also argues New Jersey Department of Environmental Protection, (hereinafter “NJDEP”), rules also forbid excluding the public from tidelands and the adjacent shoreline. As such, plaintiff argues New Jersey law and precedent demonstrate defendant may not bar the public from complex tidelands, including the Hudson River waterfront.

Additionally, plaintiff argues the elements for a public trust doctrine claim have been established. Specifically, plaintiff argues defendant admits each of the four elements: defendant admits the Hudson River is a tidal waterbody; the Tidelands Conveyance demonstrates a substantial majority of the Complex is built on lands below the mean high waterline; defendant admits it bars public access to the site’s tidelands; and defendant bars public access to favor use

by its own residents and their guests. Plaintiff thus argues defendant has violated the public trust doctrine and has no legitimate defenses.

Next, plaintiff argues New Jersey authority demonstrates Tidelands grantees cannot exclude the public from trust lands. It is argued PSE&G could not convey absolute title to defendant, as PSE&G did not have the right to convey same. It is argued the title chain of all properties bordering tidal waters in New Jersey contains implied restrictions in favor of the public. Specifically, no property owner in New Jersey may absolutely exclude the public from a tidal waterway or shore. It is thus argued defendant never had the right to restrict the public's access to the waterfront.

Further, plaintiff sets forth it is irrelevant the Association property is now above sea level. It is argued New Jersey law and precedent demonstrate the public trust doctrine applies to Tidelands previously and presently below the mean high water line. Plaintiff notes accretion, the gradual and imperceptible addition of sediment to a shoreline, adds to a shoreline property. Avulsion is a perceptible addition of sediment in a single event or series of events, does not expand the shoreline property. Plaintiff argues a property owner cannot add to their holdings by filing tidelands. Similarly, plaintiff argues defendant has not produced evidence to prove accretion has occurred, nor produced evidence as to the quality of the soil on which the Association property sits. Plaintiff asserts all evidence presented shows the site had been purposefully filled by human action and therefore the shoreline property remains the same.

Plaintiff also argues defendant possess no viable defenses. It is argued each of the defenses raised and the counterclaims for private taking are unsupported by the evidence and/or are legally deficient. Plaintiff argues defendant has violated the public trust doctrine and request the court grant summary judgment.

In defendant's cross-motion and opposition, defendant requests the court hold, by the facts of the matter, the public trust doctrine does not require the Association to allow public access to its private waterfront property. It is argued the public trust doctrine does not trump private property rights. Defendant argues the public trust doctrine provides for limited access to private property only where it is reasonable and necessary to access tidewaters and, therefore, the protection offered by the public trust doctrine is not applicable here. Defendant contends the facts and circumstances at hand do not justify converting the Association's private property to public property. Defendant asserts the Association's land at issue is 900 feet long and constitutes less than 1% of the 18.5 mile waterfront. It is also asserted the majority of the 18.5 mile waterfront is already open to the public. Defendant thus argues public demand for access to the waterway is met and it is not necessary to intrude on defendant's private land. As to the public safety issue posed by plaintiff, defendant argues the public trust doctrine does not concern sidewalk safety. Additionally, it is argued lack of sidewalk safety does not justify an invasion of private property. Defendant also asserts the sidewalk connecting the two areas of the waterway is a typical roadside sidewalk which has not been the scene of a pedestrian traffic accident in at least 10 years. It is argued the local municipal government has the responsibility to create a safe sidewalk, not the Association.

Further, defendant argues the public trust doctrine does not automatically apply to former tidelands the state has granted for exclusive, private uses. Defendant asserts the State of New Jersey has made "thousands" of tidelands grants, including granting 96% of the waterfront to private owners. Further, defendant argues the grant made by the State of New Jersey to the Association explicitly promises the land was granted for private use, reserving Public Trust uses only where such uses do not interfere with the grantee's use of the area. Defendant argues the

Appellate Court, in Bubis v. Kassin, 404 N.J. Super. 105 (App. Div. 2008), held the public trust doctrine does not grant public access to every private oceanfront property. It is argued the public trust doctrine grants limited use of private property to the public only where it is reasonable and necessary, which is not the case here.

Further, defendant argues plaintiff sets forth statutes and regulations which require the NJDEP to condition development permits on allowing public access. Defendant asserts the Association is not seeking a NJDEP permit and, therefore, the statutes and regulations plaintiff set forth are not applicable. It is asserted the Association property was constructed in the early 1980's, before an NJDEP permit was required for development along the waterfront. Defendant argues if the statute required public access without a pending NJDEP permit, same would be unconstitutional and constitute a taking of private property without just compensation. It is argued the court should avoid the taking issue and rule the statute and NJDEP regulations apply only where there exists an NJDEP permit request.

Additionally, defendant argues plaintiff's motion for summary judgment is procedurally deficient. Specifically, defendant argues the certifications of Mr. Stitzenberg and Mr. Klempner supporting plaintiff's motion are improper as to the lengthy legal arguments, the extensive statements outside of personal knowledge which constitute hearsay and speculation, and violate discovery. Further, defendant argues the provided certification of proffered expert Michael F. Sullivan, ASLA, AICP, (hereinafter "Mr. Sullivan"), is improper as plaintiff never named Mr. Sullivan as a witness. Additionally, defendant argues Mr. Sullivan's certification contains expert opinions which Mr. Sullivan is not qualified to give as he is not qualified as an expert cartographer nor an expert in interpreting maps. As such, defendant argues the certifications should be stricken from the record.

Defendant thus requests the court deny plaintiff's motion for summary judgment and grant defendant's cross-motion for summary judgment. Defendant sets forth the public trust doctrine does not require the Association to allow public access to its private waterfront property.

In reply, plaintiff argues there can be no "taking" of defendant's private property where the state already holds the property rights in trust for the public benefit under the public trust doctrine. Plaintiff asserts defendant admits; the Hudson River is a tidal waterbody; the conveyance, which is not in dispute, demonstrates the substantial majority of the Complex is built on lands formerly below the mean high water line; and the Association property blocks public access to the site's tidelands to favor use by its residents and their guests. Plaintiff contends it seeks only to bridge the gap between the existing walkway and the walkway used by the Association property. Additionally, plaintiff argues it is irrelevant whether the Association limits only one percent of the overall waterfront, as precedent demonstrates the amount of ocean waterfront restricted is immaterial. It is thus argued defendant violates the public trust doctrine and the public's fundamental right to access and use the waterfront.

Further, plaintiff argues defendant violates the public trust doctrine as the State cannot grant exclusive private use of the waterfront property. It is contended plaintiff is seeking public access over a previous tidal area which is indisputably on defendant's property. Plaintiff argues New Jersey Tidelands grants cannot exclude the public from lands protected under the trust. Plaintiff similarly asserts the public's fundamental right to reasonable access and use State tideland property cannot be terminated. It is asserted defendant concedes the land grant reserved Public Trust uses for the Tideland area, though the exact boundaries for same are in dispute. Plaintiff argues it only seeks limited access to the land to create a public walkway. As such, plaintiff argues defendant's motion for summary judgment must be denied.

Next, plaintiff argues New Jersey law is construed to ensure public access to State Tidelands pursuant to the public trust doctrine. Specifically, N.J.S.A § 13:1D-150 authorizes the NJDEP to take reasonable measures to ensure the public has access to the shorelines. Plaintiff also refutes defendant's argument granting public access to the walkway would constitute a taking. Plaintiff argues defendant does not own the property subject to this action outright, but owns it subject to the easements created by the public trust doctrine. It is thus argued enforcement of the public trust doctrine here does not constitute a taking under the constitution and defendant's motion for summary judgment must thus be denied.

Lastly, plaintiff argues plaintiff's certifications submitted with the within motion are proper under court rules and are admissible under the rules of evidence. Plaintiff argues Mr. Sullivan's report was submitted to the court in the previous matter between parties, under docket number BER-C-52-20, but the court notes same has not been demonstrated and is disputed. Further, plaintiff argues the certifications of Mr. Klempner and Mr. Stitzenberg are in compliance with R. 1:4-4 as the certifications represent the personal knowledge of each respective witness. Specifically, plaintiff argues paragraph 12 of Mr. Stitzenberg's complaint is not hearsay as it demonstrates the overwhelming support from members to connect the pathway. Plaintiff also argues paragraphs nine and 10 of Mr. Klempner's certification are asserted to express the issue's history amongst the parties. Plaintiff asserts the statements set forth in each of the certifications are not relevant to the issues of the motion, but rather are provided as statements of background. Thus, plaintiff argues the court should not strike the certifications filed in plaintiff's motion for summary judgment.

ANALYSIS

A. Summary Judgment

New Jersey's standard for summary judgment as set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) entitles a movant to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a dispute whose resolution in its favor will entitle him to judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged[.]" R. 4:46-2(c). In Globe Motor Company v. Igdalev, the Supreme Court stated that:

[t]he summary judgment rule set forth in Rule 4:46-2 "serve[s] two competing jurisprudential philosophies": first, "the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case," and second, to guard "against groundless claims and frivolous defenses," thus saving the resources of the parties and the court. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541-42 (1995) (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)). In light of the important interests at stake when a party seeks summary judgment, the motion court must carefully evaluate the record in light of the governing law, and determine the facts in the light most favorable to the non-moving party. R. 4:46-2(c).

[225 N.J. 469, 479 (2016).]

When evaluating a summary judgment motion, the motion court "does not draw inferences from the factual record as does the factfinder in a trial, who 'may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created.'" Id. (citing Brill, 142 N.J. at 536). "Instead, the motion court draws all legitimate inferences from the facts in favor of the non-moving party." Ibid. With the factual record construed in accordance with R. 4:46-2(c), the motion court's task is to "determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party." Id. at 481 (citing Perez v. Professionally Green, LLC, 215 N.J. 388, 405 (2013)).

The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. Id. at 481 (citing Bhagat v. Bhagat, 217 N.J. 22, 40 (2014)). Thus, neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action. Id.

“A litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met.” Id. at 482 (quoting Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005)). If the non-moving party “points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment.” Brill v. Guardian Life Ins. Co. Am., 142 N.J. at 529. “Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment.” U.S. Pipe & Foundry Co. v. Am. Arbitration Association, 67 N.J. Super. 384, 399-400 (App. Div. 1961) (citing Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958)). The Court in Brill encouraged trial courts not to hesitate in granting summary judgment when the appropriate circumstances are presented, such that the “evidence is so one-sided that one party must prevail as a matter of law. Brill, 142 N.J. at 540.

Generally, summary judgment pursuant to R. 4:46 is not appropriate before the party resisting such a motion has had an opportunity to complete the discovery of relevant and material evidence to aid in defense of the motion, especially when “critical facts are peculiarly within the moving party’s knowledge.” Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988). Thus, where discovery on a relevant and material issue is incomplete, the responding party must be given the opportunity to take discovery before the motion is decided. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001).

While summary judgment is generally inappropriate prior to the completion of discovery, the court is not prohibited from granting such relief prior to that time. See Velantzas, 109 N.J. at 193. In fact, in order for the objecting party to defeat a motion for summary judgment on the ground that such relief is premature due to outstanding discovery, the objecting party must demonstrate with some specificity the discovery sought and its materiality. In re Ocean County Comm'r of Registration for a Recheck of the Voting, 379 N.J. Super. 461, 478 (App. Div. 2005); see also Wellington v. Wellington, 359 N.J. Super. 484 (App. Div. 2003) (party objecting to summary judgment motion must show with some degree of particularity that further discovery will lead to material facts in dispute).

B. Public Trust Doctrine

Pursuant to N.J.S.A. § 13:1D-150, the State of New Jersey holds in trust the ownership of the State's natural resources, including surface waters, land flowed or formerly flowed by tidewaters, and tidelands, to provide access to tidal waters and shorelines for the public's use. N.J.S.A. § 13:1D-150 states:

a. The public has longstanding and inviolable rights under the public trust doctrine to **use and enjoy the State's tidal waters and adjacent shorelines for navigation, commerce, and recreational uses, including, but not limited to, bathing, swimming, fishing, and other shore-related activities;**

b. The public trust doctrine establishes the rule that ownership of the State's natural resources, including, but not limited to, ground waters, surface waters, and land flowed or formerly flowed by tidal waters is vested in the State to be held in trust for the people, that the public has the right to tidal lands and waters for navigation, fishing, and recreational uses, and, moreover, **that even land that is no longer flowed by the tide but that was artificially filled is considered to be public trust land and the property of the State;**

....

f. **Public access includes visual and physical access to, and use of, tidal waters and adjacent shorelines, sufficient perpendicular access from upland areas to tidal waters and adjacent shorelines,** and the necessary support amenities to facilitate public

access for all, including, but not limited to, public parking and restrooms.

[emphasis added]

New Jersey Courts first recognized the public trust doctrine in the seminal case, Arnold v. Mundy, 6 N.J.L. 1 (1821), where the Court addressed whether a property owner may exclude the public from State Tidelands. The Court, in Arnold v. Mundy, found Tidelands are common to the citizens of the State of New Jersey, and therefore the citizens of the State are entitled to the use of the waters and land situated on New Jersey Tidelands. Id. at 13. Notably, the Court ruled the State “cannot make a direct and absolute grant, divesting all the citizens of their common right” of access to the Tidelands, as “such a grant, or a law authorizing such a grant, would be contrary to the great principles of our constitution.” Id. at 13.

Under the public trust doctrine, the State has ownership over tidally flowed lands, and holds such ownership in trust for the citizens of New Jersey. The application of the trust has evolved with changing conditions and needs of the public. The Appellate Division addressed the principal of the public trust doctrine, in Hackensack Riverkeeper, Inc. v. New Jersey Dept. of Environmental Protection, 443 N.J. Super. 293, 303-04 (App. Div. 2015), and set forth as follows:

The public trust doctrine encompasses the "legal principle that the State holds 'ownership, dominion and sovereignty' over tidally flowed lands 'in trust for the people.'" [Citation omitted.] As a result, a "'State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers.'" *Matthews*, supra, 95 N.J. at 319, 471 A.2d 355 (quoting *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 13 S. Ct. 110, 118, 36 L. Ed. 1018, 1043 (1892)); *E. Cape May Assocs. v. State, Dep't of Env'tl. Prot.*, 343 N.J. Super. 110, 142, 777 A.2d 1015 (App. Div.) ("the sovereign never waives its right to regulate the use of public trust property"), *certif. denied*, 170 N.J. 211, 785 A.2d 439 (2001).

As the Court has reiterated:

Like many common-law principles, the public trust doctrine has adapted to the changing conditions and needs of the public it was created to benefit. Today, public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.

[Long Branch, *supra*, 203 N.J. at 475, 4 A.3d 542 (citations and internal quotation marks omitted).]

[Id.]

The public's right to access New Jersey's Tidelands has expanded and is "not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities." Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 309 (1972) (finding the principles of the public trust doctrine may change with the needs of the public). The New Jersey Supreme Court, in Borough of Neptune City, expanded the public trust doctrine in regard to shore lands to include not only the foreshore, but also the municipally owned dry-sand areas on the State's beaches. Id. The Court found even where state-owned land is conveyed to a private property owner, the land must be maintained "for public use, resort and recreation." Id. at 300. The New Jersey Supreme Court, in Borough of Neptune City, addressed the following issues:

Two aspects should be particularly mentioned, one only tangentially involved in this case and the latter directly pertinent. The former relates to the lawful extent of the power of the legislature to alienate trust lands to private parties; the latter to the inclusion within the doctrine of public accessibility to and use of such lands for recreation and health, including bathing, boating and associated activities. Both are of prime importance in this day and age. Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent. *Cf. New Jersey Sports & Exposition Authority v. McCrane*, 61 N.J. 1, at 55 (1972) (concurring and dissenting opinion of Hall, J.) All of these factors mandate more precise attention to the doctrine.

Here we are not directly concerned with the extent of legislative power to alienate tidal lands because the lands seaward of the mean high water line remain in state ownership, the municipality owns the bordering land, which is dedicated to park and beach purposes...

....

[I]t has always been assumed that the State may convey or grant rights in some tidal lands to private persons where the use to be made thereof is consistent with and in furtherance of the purposes of the doctrine, e.g., the improvement of commerce and navigation redounding to the benefit of the public. However, our cases rather early began to broadly say that the State's power to vacate or abridge public rights in tidal lands is absolute and unlimited, and our statutes dealing with state conveyances of such lands contain few, if any, limitations thereon.

....

[A]state may not completely abdicate its obligations with respect to such lands:

The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. **It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein.**

[Id. at 307-308] (emphasis added)

The Supreme Court recognized transferred property from the state to a private entity may be deemed an improper conveyance and alienation of trust property. It is immaterial whether a private owner has previously dedicated the use of a municipally owned tideland, such as a beach, to the use of the public so long as the beach is under municipal ownership and is dedicated to recreational uses. See Van Ness v. Borough of Deal, 78 N.J. 174, 179 (1978).

Thereafter, the New Jersey Supreme Court, in Matthews v. Bay Head Improv. Assoc., 95 N.J. 306, 326 (1984), again expanded the public trust doctrine and found the public “must be given both access to and use of privately-owned dry sand areas as reasonably necessary.” See also State v. 1 Howe St. Bay Head, LLC, 463 N.J. Super. 312, 341 (App. Div. 2020) (“We agree with the judge that the public trust doctrine requires the public to have access to the beaches”). The New Jersey Supreme Court, in Matthews, addressed the public right to use and access land adjacent to the water below the high water mark, and set forth in pertinent part:

[T]he public has a right to use the land below the mean average high water mark where the tide ebbs and flows. These uses have historically included navigation and fishing. In *Avon* the public’s rights were extended “to recreational uses, including bathing, swimming and other shore activities.” 61 N.J. at 309. Compare *Blundell v. Catterall*, 5 B. & Ald. 268, 106 *Eng.Rep.* 1190 (K.B. 1821) (holding no right to swim in common property) with *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842) (indicating right to bathe in navigable waters). The Florida Supreme Court has held:

The constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its foreshore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has. [*White v. Hughes*, 139 Fla. 54,59, 190 So. 446, 449 (1939).]

It has been said that “[h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state.” N.J. Sports & Exposition Authority v. McCrane, 119 N.J. Super. 457, 488 (Law Div. 1971), *aff’d*, 61 N.J. 1, appeal dismissed *sub nom. Borough of East Rutherford v. N.J. Sports & Exposition Authority*, 409 U.S. 943, 93 S.Ct. 270, 34 L.Ed.2d 215 (1972). Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare. The public’s right to enjoy these privileges must be respected.

....

We now address the extent of the public’s interest in privately-owned dry sand beaches. This interest may take one of two forms.

First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches under *Avon* and *Deal*, namely, the right to sunbathe and generally enjoy recreational activities.

....

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

....

Rather, we perceive the public trust doctrine not to be "fixed or static," but one to be "be molded and extended to meet changing conditions and needs of the public it was created to benefit."

[*Id.* at 321, 322-23, 323-24, 326]

The New Jersey Supreme Court in reviewing shorelines access considerations also set forth several relevant considerations to be analyzed in determining what access is "reasonably necessary," and set forth:

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to use and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances

prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as suitable area for recreation on the dry sand.

[Id. at 326]

Applying the factors set forth in Matthews, the New Jersey Supreme Court, in Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005), again addressed the public trust doctrine and found a privately owned beach must be available for public use. The Court set forth in pertinent part:

At oral argument before us, Counsel for Atlantis conceded vertical access to the ocean by the public from the boardwalk bathway at the terminus of Raleigh Avenue, over the bulkhead and the dunes and across the dry sand area to the ocean. Atlantis maintained its position that persons who are not members of the Beach Club may only walk along the three feet of dry sand that lie landward of the mean high water line, as so held by the trial court, and may not use the dry sand beach beyond that horizontal three-foot strip of sand.

....

The law we are asked to interpret in this case—the public trust doctrine—derives from the English common law principle that all of the land covered by tidal waters belongs to the sovereign held in trust for the people to use. Borough of Neptune City v. Borough of Avon-by-the-Sea, 296, 303,294 A.2d 47 (1972). That common principle, in turn, has roots[:]

in Roman jurisprudence, which held that "[b]y the law of nature[,] . . . the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." . . . No one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there, and haul them from the sea. . . ." The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it."

[Matthews, supra, 95 N.J. at 316-17, 417 A.2d 355 (citations and footnote omitted).]

In Arnold v. Mundy, 6 N.J.L. 1, 53 (E. & A.1821), the first case to affirm and reformulate the public trust doctrine in New Jersey, the Court explained that upon the Colonies' victory in the Revolutionary War, the English sovereign's rights to the tidal waters "became vested in the people of New Jersey as the sovereign of the country,

and are now in their hands." *Arnold, supra* addressed the plaintiff's claim to an oyster bed in the Raritan River adjacent to his farm in Perth Amboy. *Id.* at 45. Chief Justice Kirkpatrick found that the land on which water ebbs and flows, including the land between the high and low water, belongs not to the owners of the lands adjacent to the water, but to the State, "to be held, protected, and regulated for the common use and benefit." *Id.* at 49, 71.

[*Id.* at 51-52]

Notably, N.J.S.A. § 13:1D-150 grants authority to the New Jersey Department of Environmental Protection to protect the public's right of access to New Jersey Tidelands and the adjacent shorelines. N.J.S.A. § 13:1D-150 sets forth:

e. The Department of Environmental Protection has the authority and the duty to protect the public's right of access to tidally flowed waters and their adjacent shorelines under the public trust doctrine and statutory law. In so doing, the department has the duty to make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable, protect existing public access, provide public access in all communities equitably, maximize different experiences provided by the diversity of the State's tidal waters and adjacent shorelines, ensure that the expenditure of public moneys by the department maximizes public use and access where public investment is made, and remove physical and institutional impediments to public access to the maximum extent practicable.

It can be derived from that the legislative intent that the public's right is vested to the shorelines adjacent to the Hudson River, and may be accessed pursuant to the public trust doctrine.

This court finds the public trust doctrine applies in this matter. The conveyance by the state to PSE&G and thereafter to defendant does not destroy the public's right to access the tidal waters and shoreline property, as same is protected by the public trust doctrine. The public's right is inalienable and vested. Plaintiff moves for the right to access the resources necessary for health, recreation, and sport, which use is not disputed. The Walkway is used as a recreational area along

the Hudson River. The court finds the public, pursuant to precedent, is to be provided access to the water, tidelands, and shoreline.

CONCLUSION

The court grants in part plaintiff's motion for summary judgment, and denies defendant's cross-motion for summary judgment. The court finds no material issue of fact exists as to whether the public trust doctrine applies to the Association property. The public trust doctrine permits public access to the Hudson River, tidelands, and shoreline. Defendant violates the public trust doctrine by precluding and restricting the public's access to the waterfront area on the Association Property. It is established the public trust doctrine applies to provide citizens a reasonable right of access to the river and shoreline, but at this juncture without further discovery the court cannot determine the area of access. The exact measure and parameters of the Walkway access cannot be determined as a matter of law without further discovery. The court has found the Walkway is essential for a recreational purpose, thus the Association must allow public access on the public trust lands. Though defendants hold title on the land, the title is subject to reserved easements for public use along the formerly flowed tideland property. As stated, the court finds defendants must allow public access to a portion of the land to be determined. However, determination of the exact access area requires further evidence. The parties are to undertake discovery as to same. A case management conference shall be held on February 15, 2023. The court denies defendant's cross-motion to find the public trust doctrine does not require public access.

For the aforementioned reasons, the court grants in part plaintiff's motion for summary judgment and denies defendant's cross-motion for summary judgment.