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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6188-03T5

JERSEY CITY SCHOOL DISTRICT,

Petitioner-Appellant/
Cross-Respondent,

v.

MARATHON ENTERPRISES, INC.,

Respondent-Respondent/
Cross-Appellant.

Argued: October 17, 2006 - Decided: January 4, 2007

Before Judges Coburn, Axelrad and R.B. Coleman.

On appeal from a Final Decision of the New Jersey Department of Community Affairs, CAF-9962-00 and CAF-1465-04.

John J. Curley argued the cause for appellant/cross-respondent (John J. Curley, attorney; Mr. Curley, of counsel; Kim T.H. Krynicki, on the brief).

Edward D. McKirdy argued the cause for respondent/cross-appellant (McKirdy & Riskin, attorneys; Mr. McKirdy, of counsel and on the brief; Thomas Olson and L. Jeffrey Lewis, on the brief).

PER CURIAM

The condemnor, New Jersey City School District ("District"), appeals from a final determination of the

Commissioner of the Department of Community Affairs (DCA) awarding Marathon Enterprises, Inc. ("Marathon") $2,039,265.35 in relocation reimbursement expenses following the condemnation of a Sabrett hot dog manufacturing plant owned by Marathon. The Commissioner adopted in its entirety the initial decision of the administrative law judge who heard the contested issues. We affirm.

The following is the testimony presented during the three day hearing before Administrative Law Judge Leslie Z. Celentano. On June 19, 1997, the District passed a resolution designating a site for the construction of a new elementary school, which necessitated the acquisition of various parcels in Jersey City. The District subsequently filed an eminent domain action against Marathon to acquire its real property and improvements, a Sabrett hot dog manufacturing plant, located at 50 Colden Street. Following a jury trial, judgment was entered on December 18, 2001, fixing the condemnation compensation to Marathon at $5,200,000 plus interest.

Marathon had initially attempted to identify other sites for the new school but when its efforts to avoid the condemnation were unsuccessful, its representatives began searching for a property where Marathon could relocate its Jersey City meat processing operations. Daniel Kruse,

Marathon's Vice President of Maintenance, Boyd Adelman, Marathon's Executive Vice President and General Counsel, and Johannes Hoffman, an architect retained by Marathon, testified about their search beginning in 1997 and through most of 1998 in Jersey City, Secaucus, Hoboken and Carlstadt, and their inability to locate suitable substitute properties that could be used for meat processing and comply with the strict United States Department of Agriculture (USDA) requirements without substantial modifications and expense. The District did not locate any suitable substitute properties.

The building Marathon ultimately selected as a replacement was a former truck garage at 777 East 138th Street in the Bronx, New York, which was adjacent to its existing Bronx facility that conducted essentially the same operation and process of producing hot dogs, and which had only recently come on the market. Marathon planned to create an integrated plant with two product flow lines. Marathon purchased the building and vacant lot next door, which was to be used as a shipping platform, and began planning the modifications necessary to make the facility USDA-compliant and to accommodate the machinery and equipment relocated from the Jersey City plant. The total cost to Marathon of the entire project, including the acquisition of the building and vacant lot, was approximately $11 million.

A letter agreement was entered into between the parties on December 30, 1999, stipulating that Marathon was a "displaced business concern" pursuant to N.J.A.C. 5:40-1.2, and entitled to receive payments in accordance with the relocation laws. On May 5, 2000, Marathon submitted a relocation claim (the "first claim") to the District in the amount of $1,303,608 relating to physical modifications and installations for the new property, generally summarized in the following categories:

- Obtaining necessary building permits;
- Removing the existing flooring;
- Lowering the floor level of 777 138th Street (and related work such as extending the load bearing supports once the floor was lowered);
- Trenching to install a floor drainage system at 777 138th Street;
- Completing the plumbing work for the drainage system;
- Pouring a new floor, sloping toward the floor drain;
- Installing required special, washable floor tiles that could withstand the 180 degree water utilized every four hours for a complete facility wash down pursuant to USDA requirements; and
- Cutting and finishing door openings between the two buildings and within 777 138th Street.

During the hearing, Marathon's representatives explained in detail the basis for these expenditures. In summary, the existing building in the Bronx did not have sufficient space for the Jersey City machinery and thus it was necessary to modify both buildings. The most expensive modification to the new

building was the lowering of the floor, which was several feet higher than the floor of the original Bronx facility, because 138th Street is on an upgrade. To integrate the Jersey City machinery with the existing facility, it was necessary to operate on one level to enable equipment to move back and forth, to accommodate the USDA required floor drains every four feet, and to re-allocate the space devoted to the various stages of hot dog production from the original building to both buildings. It was also necessary to design the modified building to maintain the same strict separation between the raw meat and cooked meat stages of production that the Jersey City facility had and to allocate the Jersey City machines to the areas appropriate for their function, e.g., choppers and an emulsifier to the chopping room and peelers and multi-vac machines to the packing room. The flow of the Bronx operation before the move almost exactly mirrored the flow of the Jersey City plant.

The District conditionally rejected the first relocation claim on July 27, 2000, indicating the documentation submitted by Marathon had not clearly explained "the relationship between the physical changes that were done with the specific machinery and equipment," although no additional documentation or information had been sought prior to the rejection, and the "expenditures for physical changes [were] beyond those necessary

to accommodate the machinery and equipment and which enhance the property's value." The District paid no part of Marathon's claim. Marathon filed its appeal on August 3, 2000.

Around February 2001, Marathon submitted a claim to the District in the amount of $397,000 for moving expenses, which the District approved. Marathon received an advanced payment of half of the amount prior to its relocation in March 2001, and the remainder following the completion of the move.

By agreement with the District, Marathon reserved the right to file claims serially, and filed a second relocation claim in August 2001, in the amount of $758,505.35 for electrical wiring and utility service. The most significant item was the cost of the new electrical service necessary to provide power to the Jersey City machinery ($534,010), and the balance of the claim was the cost of electric wiring and plumbing connections for the Jersey City machinery. The District denied this claim on June 5, 2003, on the basis that Marathon had "received compensation for all the claimed hookups as part of its state authorized eminent domain award" and the electrical systems installed were "physical changes beyond those necessary to accommodate the relocated machinery and equipment and which enhance the property's value." The District paid no part of Marathon's

second relocation claim. Marathon filed its appeal on June 10, 2003.

The DCA requested the appeals be consolidated and transferred to the OAL as a contested case. On February 2, 3, and 4, 2004, ALJ Celentano heard testimony from Marathon's witnesses, Kruse, Adelman, Hoffman, and Charles Land, a machinery and equipment appraiser; and Harry Laurie, a private relocation consultant, the District's witness. On May 11, 2004, the ALJ issued her initial decision, finding Marathon was entitled to $2,039,265.35, comprised of $1,280,760 as "actual reasonable and necessary costs incurred for physical changes to the building to accommodate the machinery and equipment relocated" and $758,505.35 in "actual reasonable and necessary costs of reconnecting utility service to the relocated machinery and equipment." In a lengthy decision the ALJ explained the reasons for allowing all of the claims submitted by Marathon except the approximately $23,000 expense designated as inspection and license fees. According to the ALJ, the later expense was disallowed due to lack of evidence in the record describing the fees for which reimbursement was sought. This item has not been appealed.

On June 3, 2004, the DCA Commissioner adopted the initial decision of the ALJ in its entirety as the Agency's final decision.

The District filed an appeal of their award, arguing that our standard of review is de novo because this involves an interpretation of law, the Relocation Assistance Act and its regulations. The District further urges that the ALJ, and the DCA in adopting the initial decision, erred in their factfinding, which could not have been reached on sufficient credible evidence in the record, and thus urges us to make our own factual findings and conclusion. More particularly, the District contends the DCA erred in awarding Marathon the relocation reimbursement because: (1) the claims were ineligible business re-establishment expenses, not eligible moving expenses under N.J.A.C. 5:11-3.9[1]; (2) the first claim for physical modifications to the replacement building to render it USDA-compliant is expressly excluded as a reimbursable expense under N.J.A.C. 5:11-3.9(a)4; (3) the second claim was primarily comprised of Marathon's costs for installing a new electrical service in the integrated Bronx plant and garage, which are not

[1]Prior to May 20, 2004, these relocation regulations were codified as N.J.A.C. 5:40-39. They have been recodified in Chapter 11 of Title 5 and, for convenience, we will cite to the new codification.

a reimbursable basic utility reconnection expense under N.J.A.C. 5:11-3.9(a)3; and (4) even if the claims were eligible moving expenses subject to reimbursement under New Jersey law, they were duplicative payments barred by N.J.S.A. 20:4-16 and 20:4-18, due to the condemnation award. Alternatively, the District contends that if we reject its legal arguments as to Marathon's first and second claims, the following two key factfindings made by the ALJ and adopted by the DCA provided an independent basis for reversal as they are unsupported by substantial and credible evidence in the record: (1) the District did not fulfill its relocation obligations towards Marathon and (2) a completely new electrical service was not installed in the replacement property and it was a reasonable and necessary relocation expense for Marathon to have a duplicate electrical power supply at its integrated Bronx plant.

On cross appeal, Marathon asserts that the DCA erred in denying its request for pre-judgment interest on its relocation claims. Marathon seeks interest on equitable grounds based on the District's failure to process Marathon's relocation claims "promptly" in accordance with its contractual commitment to Marathon. Marathon requests we modify the DCA's final decision to provide that pre-judgment interest at the rate set forth in Rule 4:42-11 be paid by the District on the first and second

relocation claims, after thirty days from the date each such claim was submitted. Marathon further requests we award post-judgment interest on the DCA award.

We have carefully reviewed the testimony and evidence presented below, as well as ALJ Celentano's analysis of the evidence and detailed findings of fact contained in her fifty-one page initial decision, upon which the DCA's Commissioner's final determination was based, in light of the challenges asserted by the District in the record below and on appeal. We are satisfied the findings of fact upon which the final agency determination was made are neither shockingly lacking nor self-contradictory, as urged by the District's counsel in oral argument. On the contrary, the ALJ made detailed findings of fact that are supported by substantial credible evidence in the record, and are thus entitled to deference. As the court stated in In re Taylor, 158 N.J. 644, 656-57 (1999):

> [F]indings of fact made by a trial judge "are considered binding on appeal when supported by adequate, substantial and credible evidence," Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974), and that standard is equally applicable to reviews of administrative decisions, see Close [v. Kordulak Bros.], 44 N.J. [589,] 599 [(1965)] (holding that scope of review of administrative decision "is the same as that [for] an appeal in any nonjury case").

The record is clear the District did not assist Marathon in locating a suitable replacement property. There is no indication in the record, however, that the ALJ interpreted New Jersey law as obligating the District to guarantee Marathon it would find a suitable replacement site or that she punished the District for not doing so. The ALJ's findings on this topic were made in the context of the District's innuendo that Marathon had a hidden agenda in purchasing the vacant warehouse next to its Bronx meat processing facility for the relocated Jersey City plant. Moreover, it is likely that if the ALJ's perception of the District's "fault" permeated her decision, she would have awarded Marathon pre-judgment interest on its claims on equitable grounds, which she did not. As to the second claim pertaining to the utility service, which we will address later in this opinion, we note the District chose not to avail itself of the opportunity to present expert testimony to contradict that of Marathon's witnesses.

The ALJ also provided a detailed legal analysis of the Relocation Assistance Act of 1971, N.J.S.A. 20:4-1 to -22, and its relevant regulation, N.J.A.C. 5:11-3.9, as well as the applicable case law. The Relocation Assistance Act was intended to establish the policy for "the fair and equitable treatment of persons displaced by the acquisition of real property by . . .

local land acquisition programs. . . ." N.J.S.A. 20:4-2. As the ALJ noted, our courts have recognized that the Relocation Assistance Act is remedial legislation, Maticka v. City of Atlantic City, 216 N.J. Super. 434, 448-49 (App. Div. 1987), and as such, its relocation provisions should be construed liberally in favor of the displaced person, the party to be benefited by the legislation. See Brunell v. Wildwood Crest Police Dep't, 176 N.J. 225, 235 (2003); Torres v. Trenton Times Newspaper, 64 N.J. 458, 461 (1974); Turon v. J. and L. Constr. Co., 8 N.J. 543, 558 (1952). Moreover, in interpreting the Relocation Assistance Act, we should defer to the Commissioner of the DCA, who has been granted broad discretion to promulgate the regulations. N.J.S.A. 20:4-10. As stated by the New Jersey Supreme Court:

> It is a fundamental maxim that the opinion as to the construction of a regulatory statute of the expert administrative agency charged with the enforcement of that statute is entitled to great weight and is a "substantial factor to be considered in construing the statute."
>
> [New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 575 (1978) (citations omitted).]

We have recognized this deference "is grounded in the notion that an administrative agency which deals regularly with cases in an area is often in a better position than our courts to

assess the meaning of particular provisions." In Re Berwick Ice, Inc., 231 N.J. Super. 391, 397 (1989). Accordingly, we will not disturb the DCA's interpretation of the Relocation regulations "unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, 89 S. Ct. 1794, 1802, 23 L. Ed. 2d 371, 384 (1969); see Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 69-70 (1978).

In view of our limited scope of review and deference to the factfinder and expertise of the agency, we discern no legal basis to second-guess the DCA's award of Marathon's relocation claims without interest. We affirm substantially for the reasons set forth in the ALJ's comprehensive initial decision of May 11, 2004. We add the following comments.

The applicable New Jersey regulation governing Marathon's relocation reimbursement claim is N.J.A.C. 5:11-3.9, which provides for claims relating to reconnection of utilities services to machinery and equipment and claims relating to physical changes to a building to accommodate relocated machinery and equipment, in relevant part, as follows:

> 5:11-3.9 Moving expenses; business
>
> (a) A relocation payment for moving expenses of a business shall be limited to the following items, as applicable:
>
> . . . .

> 3. The actual reasonable and necessary cost of reconnecting utility service to machinery and equipment, including, without limitation, the cost incurred in adapting or converting relocated machinery or equipment to use a different type of power supply, to the extent that these services were required in the former location. Expenses incurred in providing utility service from the right-of-way to the building or improvements are excluded.
>
> 4. The actual reasonable and necessary cost incurred for any physical changes in or to an existing building to which a business relocates in order to accommodate the machinery and equipment relocated. Physical changes beyond those necessary to accommodate the machinery and equipment which enhance the property's value are excluded, as are changes necessary to meet code requirements <u>except when necessary to install specific equipment moved from the former location</u> . . . (emphasis added).

We find completely unpersuasive the District's analogy to federal relocation law and its attempt to draw a distinction between eligible "moving expenses" and Marathon's claims, which it considers to be ineligible "business reestablishment expenses." It is immaterial that the the Federal Regulations and cases list two categories of eligible reimbursement expenses, moving expenses and business reestablishment expenses, and define them in terms of "whether modifications are made to personal property [moving expenses] or to the replacement real property [to accommodate the business operation]." <u>The M/V Cape Ann v. United States</u>, 199 <u>F.</u>3d 61, 67 (1st Cir. 1999); 49

C.F.R. § 24.303(a) and §24.304(a). We perceive no reason to extrapolate from federal law to interpret N.J.A.C. 5:11-3.9(a) when the distinction between "eligible moving expenses" and "ineligible business reestablishment expenses" is not part of the governing New Jersey law. On the contrary, the New Jersey regulation allows reimbursement for the broad category of "moving expenses of a business," N.J.A.C. 5:11-3.9(a), which expressly includes reimbursements for certain modifications to the replacement real property, N.J.A.C. 5:11-3.9(a)4.[2]

Thus, the ALJ properly analyzed Marathon's claims pursuant to the plain language and remedial purpose of N.J.A.C. 5:11-3.9(a)3 and 4 and the applicable New Jersey case law. See Foreign Auto Preparation Serv. v. New Jersey Economic Dev. Auth., 201 N.J. Super. 428, 435 (App. Div. 1985) ("FAPS") ("The purpose of the [Relocation Assistance Act and its regulations] is to leave the displaced business in reasonably the same position it was in before the displacement . . . ."); Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, cert. denied, 444 U.S. 900, 100 S. Ct. 210, 62 L. Ed. 2d 136 (1979). The ALJ was satisfied Marathon did not "profit from the displacement," FAPS,

[2]Furthermore, as pointed out by Marathon in its brief, the District's reliance on federal law is also flawed as the predecessor regulation to N.J.A.C. 5:11-3.9(a)(4), enacted in substantially the same form on October 1, 1979, predated the federal "Business Re-establishment Expenses" Amendment in 1987.

supra, 201 N.J. Super. at 434, that the approximately $2 million claim submitted by Marathon represented less than twenty percent of its total project costs for the acquisition of the property and work performed at the Bronx facility occasioned by the District's condemnation of Marathon's Jersey City manufacturing plant.

There is no dispute that Marathon actually incurred the $1,303,608 in costs included in its first claim. Moreover, Marathon's witnesses testified that the physical changes made to the Bronx facility were necessary to accommodate the relocated machinery and equipment and the installation and operation of that equipment in accordance with the stringent requirements of the USDA for meat processing facilities. The ALJ commented on the deficiencies in the District's proofs, noting the lack of testimony to support the District's assertions that the capacity of the new combined plant will greatly exceed that of the former plant; there was no need to combine two pre-existing plants and they should have operated as side-by-side stand-alone facilities; the former Bronx facility was "redesigned"; there was a more suitable site that could have met the USDA's strict requirements and also accommodated the machinery and equipment with fewer changes or at less expense; and there was a less costly manner of accommodating the relocating equipment or that

the integration of the existing Bronx facility with the adjacent purchased building was more costly than operating two separate facilities. The ALJ also noted the District asserted the expenditures were "beyond those necessary to accommodate the machinery and equipment and enhance the property's value," N.J.A.C. 5:11-3.9(a)4, yet it presented no lay or expert testimony to support its position.

Nor does the District offer any authority to support its argument that N.J.A.C. 5:11-3.9(a)4 only allows reimbursement for physical changes to the replacement site to accommodate relocated machinery and equipment, such as moving a wall or beam to fit a particular machine, but does not provide for renovating a replacement building to comply with code requirements for the conduct of a specific business. The flaw in the District's argument, which the ALJ expressly addressed, is that Marathon's specialized machinery can only function when it is properly installed in a building that meets the applicable USDA guidelines, which is clearly contemplated within the language and intent of the regulation. The record clearly indicated it was necessary to modify the floor so it was level and had the proper surfacing and drainage to accommodate and install the specific equipment moved from Jersey City so it could operate in accordance with the USDA regulations and basic standards of

health protection for a meat processing plant. Based on the undisputed testimony and evidence submitted by Marathon, which the ALJ credited, she found the relocation costs submitted in the first claim to be reasonable.

We are also satisfied there is sufficient factual basis in the record and ample legal authority for the ALJ's allowance of each component of Marathon's second claim for utility reimbursement. We thus defer to the interpretation of the regulation afforded by the ALJ and administrative agency as reasonable and consistent with the case law.

As the ALJ noted, the District denied Marathon's second claim, in part, based on N.J.A.C. 5:11-3.9(a)4 rather than N.J.A.C. 5:11-3.9(a)3, indicating that the new electric service was a physical change beyond that necessary to accommodate the relocated machinery and equipment and that it enhanced the property's value.[3] However, N.J.A.C. 5:11-3.9(a)3 sets forth a separate item of relocation compensation distinct from § (a)4 for the "actual reasonable and necessary cost of reconnecting utility service to machinery and equipment." Contrary to the District's assertion, the regulation does not limit reimbursement to "the cost incurred in adapting or converting

[3]The District also contended Marathon received payment in its condemnation proceeding for the electrical hookup.

relocated machinery or equipment to use a different type of power supply, to the extent that these services were required in the former location." N.J.A.C. 5:11-3.9(a)3. Rather, the express language is that the benefits "include[], without limitation such expenses." Ibid. (emphasis added). The only express exclusion is expenses incurred in obtaining utility services from the right-of-way to the building, which is inapplicable as Marathon's claim relates solely to the expenses of electrical equipment and wiring within the building.

Marathon presented extensive testimony concerning the electrical systems necessary to run its hot dog manufacturing, and the necessity of two power systems, service A and a backup system B. The uncontroverted testimony presented by Marathon, and credited by the ALJ, was that the electric service at the Bronx facility was insufficient to run both the equipment that had been there and the equipment that was relocated from Jersey City. The District presented no testimony as to the cost of supplying transformers for each separate piece of relocated machinery and the ALJ concluded, based on the testimony presented, that it was necessary to build an electrical transformer room and for Con Edison to boost off the electrical service to accommodate the emulsifiers, choppers, and other specialized equipment that had been relocated from the condemned

facility. Marathon's witnesses also testified about the need for a backup system that would run the new facility at one-half capacity so the product could continue to be produced in the event of a power loss. As Marathon's Vice President of Maintenance explained, since there originally were separate facilities in the Bronx and Jersey City, if one plant lost power, the other could provide an alternate power source. With both facilities combined in one place, however, without a backup system, the food would spoil and there would be a complete shutdown of the Marathon Bronx plant in the event of a power loss. We are satisfied, as was the ALJ, with Kruse's explanation as to why more power was needed in the Bronx than had been the capacity in Jersey City and as to the need for the new A and B electrical services. The District presented no testimony or evidence that this new electrical system created a "state of the art" plant at the Bronx facility.

There is no basis in the record for the District's contention that any portion of the electrical service and utility distribution expenses contained in Marathon's second claim were duplicative payments barred by the condemnation award. The $5,200,000 condemnation award entered in December 2001 did not contain special interrogatories, so there was no breakdown of the items covered by the compensation. Moreover,

as the record does not include a transcript of the condemnation trial, the appraisals, standing alone, are of no evidential value in determining the basis for the jury's award. As such, the ALJ and adopting agency properly found the District had failed to satisfy its burden of proof that any of the items contained in the relocation award were duplicative payments.

We turn now to Marathon's cross-appeal challenging the agency's denial of its request for interest on the relocation award. Marathon seeks interest on equitable grounds that derive from the District's contractual commitment under the parties' December 30, 1999 letter agreement to "promptly process and pay all [relocation claims, as required by the relocation laws], based on its claimed unjustified and extensive delays in meeting this obligation. Marathon points out that the District forced it to litigate the matter by refusing to pay any part of the first or second relocation claims and that the ALJ and the DCA Commissioner found virtually all of Marathon's claims were meritorious. Thus, urges Marathon, given the substantial sums involved and the merit of its claims, it would be inequitable to allow the governmental agency to unjustifiably delay processing and paying the claims without incurring interest on the obligation. Marathon reminds us we have expressly recognized the inherent power of agencies to award pre- and post-judgment

interest on money claims. See Bd. of Education v. Levitt, 197 N.J. Super. 239, 246 (App. Div. 1984).

The ALJ was not convinced that the language of the parties' agreement requiring the District to "promptly process and pay" statutory relocation benefits afforded Marathon a legal or equitable entitlement to interest under the circumstances of the case. The District felt it was justified in denying the relocation expenses. Simply because the bulk of the claim was ultimately approved by the DCA does not necessarily mean the District did not "turn square corners." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985). Thus, in the absence of any express or implied terms in the parties' agreement setting forth specific time frames for payment and requiring the payment of interest if the time frames were not met, or any finding by the ALJ of bad faith by the District, we discern no basis to disturb the agency's decision to deny interest on the relocation award.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION