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File No.: 450081-12029

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September 8, 2016

VIA FEDEX

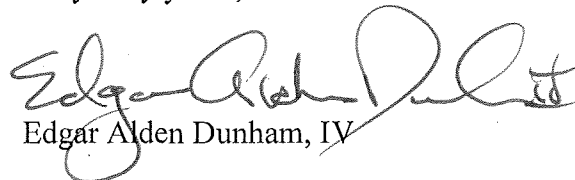
Central Fee Office
Monmouth County Courthouse
71 Monument Park
P.O. Box 1260
Freehold, NJ 07728-1269

**Re: Highview Homes, LLC v. Township of Hazlet and
Planning Board of the Township of Hazlet v.
The Church of the Holy Family
Docket No.: MON-L-4224-15
Motion to Dismiss
Returnable: September 30, 2016**

Dear Sir or Madam:

Enclosed for filing are an original and one copy of a Notice of Motion, Statement of Material Facts, Brief, Certification of Deacon Neil Pirozzi, Certification of Filing and Service and proposed form of Order in connection with the above matter. Kindly charge the filing fee (\$50.00) to our Superior Court account no. 140086 and return the stamped copy in the self-addressed envelope enclosed.

Very truly yours,


Edgar Alden Dunham, IV

EAD:sb
Enclosures

cc: Hon. Jamie S. Perri, J.S.C. (w/enc. via FEDEX)
James H. Gorman, Esq. (w/enc. via email and regular mail)
Richard J. Hoff, Jr., Esq. (w/enc. via email and regular mail)

ECKERT SEAMANS CHERIN & MELLOTT, LLC

David M. Roskos, Esq. (NJ Bar ID #026561982)

Edgar Alden Dunham, Esq. (NJ Bar ID #023401988)

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Telephone: (609) 392-2100

Facsimile: (609) 392-7956

Attorneys for Third Party Defendant, The Church of the Holy Family

HIGHVIEW HOMES, LLC,

Plaintiff,

v.

TOWNSHIP OF HAZLET and
PLANNING BOARD OF HAZLET.

Defendants.

and

TOWNSHIP OF HAZLET,

Defendant/Third Party
Plaintiff,

v.

THE CHURCH OF THE HOLY FAMILY,

Third Party Defendant.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY, LAW DIVISION,
DOCKET NO.: MON-L-4224-15

Civil Action

**NOTICE OF MOTION TO DISMISS THIRD
PARTY COMPLAINT FOR FAILURE TO
STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED**

TO: James H. Gorman, Esq.
1129 Broad Street
Shrewsbury, NJ 07702
Attorney for Defendant/
Third Party Plaintiff,
Township of Hazlet

COUNSEL:


PLEASE TAKE NOTICE that on Friday, September 30, 2016 at 9:00 o'clock a.m. EST, or as soon thereafter as counsel may be heard, Eckert Seamans Cherin & Mellott, LLC, counsel for third party defendant, The Church of The Holy Family ("Holy Family") on notice to James H. Gorman, Esq., Counsel for defendant/third party plaintiff Township of Hazlet ("Hazlet") shall move before the Honorable Jamie S. Perri, J.S.C., New Jersey Superior Court, Law Division, Monmouth County, Monmouth County Courthouse, 71 Monument Drive, P.O. Box, 1266, Freehold, New Jersey 07728-1266 for an entry of an Order dismissing the third party complaint brought by Hazlet against Holy Family.

PLEASE TAKE FURTHER NOTICE that in support of this motion, defendant will rely upon the Brief and accompanying Certification of Deacon Neil Pirozzi being filed simultaneously herewith.

PLEASE TAKE FURTHER NOTICE that any response to the motion shall be served and filed in accordance with the Court's Local Rules.

A proposed form of Order is submitted herewith. Oral argument is requested in the event of opposition.

**ECKERT SEAMANS CHERIN
& MELLOTT, LLC**
Attorneys for Third Party Defendant,
Church of the Holy Family

By: 
David M. Roskos, Esq.
Edgar Alden Dunham, IV, Esq.

Dated: September 8, 2016

ECKERT SEAMANS CHERIN & MELLOTT, LLC

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Plaintiff,

v.

TOWNSHIP OF HAZLET and
PLANNING BOARD OF HAZLET.

Defendants.

and

TOWNSHIP OF HAZLET,

Defendant/Third Party
Plaintiff,

v.

THE CHURCH OF THE HOLY FAMILY,

Third Party Defendant.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY, LAW DIVISION,
DOCKET NO.: MON-L-4224-15

Civil Action

**STATEMENT OF
MATERIAL FACTS
PURSUANT TO R.4:46-2(a)**

1. The Church of the Holy Family (“Holy Family”) has its principal office located at 727 Highway 36, Union Beach, New Jersey 07735. Third Party Complaint, ¶2.

2. Holy Family also owns property (the “property”) known as 910 Highway 36, Hazlet Township, NJ 07730, also identified as Lot 26, Block 68.13 and Lot 8, Block 69.09 on the tax map of the Township of Hazlet (“Hazlet”). Third Party Complaint, ¶2.

3. The property contains an unused school building. Since 2010, Holy Family has made various attempts at developing the property and/or selling it. Third Party Complaint, ¶¶8 and 10-21 and Certification of Deacon Neil Pirozzi (“Pirozzi Cert.”) 2-9. As is generally referred to in the Third Party Complaint, those attempts have included:

a. In 2010, Holy Family requested that the property be rezoned from single family residential to business highway to make the property more attractive for commercial development. Hazlet did so, but only as to a portion of the property on or about March 15, 2011; and

b. That change did not result in a sale of the property or development of the property; and

c. Tri-State Commercial, Inc. expressed interest in the Property and asked Hazlet about additional zoning changes to permit a 65 unit multi-family development on the rear part of the property which was still zoned for single family residential; and

d. That proposal did not result in a sale of the property or development of the property; and

e. The next proposal came from William F. Bargelow, who proposed that the entire parcel be used for business purposes and requested that the rear portion be rezoned as business highway; and

f. Mr. Bargelow’s proposal did not result in a sale of the property or development of the property either; and

g. Subsequently, M&M Realty Partners (“M&M”) expressed interest in the property, and apparently requested some type of residential use from Hazlet. There was no contract between Holy Family and M&M; and

h. M&M Realty's interest also did not result in a sale of the property or development of the property; and

i. Holy Family subsequently entered into a contract with Highview Homes, LLC ("Highview"); and

j. Pursuant to the contract between Holy Family and Highview, Highview will purchase the property and develop it provided it is able to receive the appropriate municipal approvals.

4. Other than Holy Family's initial request in 2010 that the front half of the property be rezoned, all of the subsequent requests for rezoning have come from prospective purchasers seeking to develop the property. See Pirozzi Cert., ¶ 3-6.

5. None of those prospective purchasers seeking to develop the property were acting as agents or alter egos of Holy Family. Each was an independent party seeking to further its respective plans for development of the property. Id.

6. Highview has presented the current plan for the property. Highview is a contract purchaser of the property. It is also the plaintiff in this action seeking the Builder's Remedy. Id. at ¶8.

7. Highview is not an agent or alter ego of Holy Family. It seeks the Builder's Remedy in order to further its own plans for the property. Id. at ¶ 9 .

HIGHVIEW HOMES, LLC,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION: MONMOUTH
Plaintiff,	:	COUNTY
v.	:	
	:	
TOWNSHIP OF HAZLET and	:	DOCKET NO. MON-L-4224-15
PLANNING BOARD OF HAZLET.	:	
	:	
Defendants.	:	
and	:	
	:	
TOWNSHIP OF HAZLET,	:	
	:	
Defendant/Third Party	:	
Plaintiff,	:	
v.	:	
	:	
THE CHURCH OF THE HOLY FAMILY,	:	
	:	
Third Party Defendant.	:	

**BRIEF IN SUPPORT OF MOTION TO DISMISS
 THIRD PARTY COMPLAINT FOR FAILURE TO STATE A CLAIM
 UPON WHICH RELIEF CAN BE GRANTED**

ECKERT SEAMANS CHERIN & MELLOTT, LLC
 David M. Roskos, Esq. (NJ Bar ID #026561982)
 Edgar Alden Dunham, IV, Esq.(NJ Bar ID #023401988)
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Attorneys for The Church of The Holy Family

Of Counsel and on the Brief:
 David M. Roskos, Esq.
 Edgar Alden Dunham, IV, Esq.

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PRELIMINARY STATEMENT

This is a motion on behalf of the Church of the Holy Family (“Holy Family”) to dismiss the Third Party Complaint brought by defendant Township of Hazlet (“Hazlet”) for failure to state a claim upon which relief can be granted. The matter arises out of a builder’s remedy suit sought by plaintiff Highview Homes, LLC (“Highview”). Hazlet contends that it must bring the third party action because Holy Family is “a necessary and indispensable party” (see ¶7 to the Third Party Complaint) and because Holy Family failed to act in good faith in negotiations with Hazlet (see ¶ 32 to the Third Party Complaint).

Under the law, as set forth in detail herein, Holy Family is not “necessary and indispensable” and Hazlet’s claim of lack of good faith is only relevant to a builder’s remedy action when directed as a defense against the plaintiff, which Holy Family is not. Accordingly, the third party action fails to state a claim upon which relief can be granted and must be dismissed.

FACTS

Holy Family is the owner of certain property (the “property”) in Hazlet know as 910 Highway 36, also identified as Lot 26, Block 68.13 and Lot 8, Block 69.01 on the Hazlet tax map. Third Party Complaint, ¶¶ 2 and 3. Plaintiff, Highview is the contract purchaser of the property. Third Party Complaint, ¶ 8; Complaint, ¶ 29; Certification of Deacon Neil Pirozzi (“Pirozzi Cert.”), ¶ 7.

Various schemes have been proposed for the property in the past by prospective purchasers who approached Hazlet to inquire about rezoning. Third Party Complaint, ¶¶ 10-21 and Pirozzi Cert., ¶¶ 2-9. None of those ventures resulted in development or sale of the property.

Highview, the current developer of the property, seeks a “builder’s remedy” against Hazlet, alleging exclusionary zoning. Contrary to well-established case law, Hazlet seeks to bring Holy Family in as a party and argues that because the previous negotiations with Hazlet over zoning did not include low income housing, Holy Family has not negotiated in good faith prior to bringing suit as required by the case law. Hazlet argues therefore that, Highview’s action must be dismissed. The Third Party Complaint ignores the fact that Holy Family has not brought suit and our courts only consider lack of good faith to be relevant to a builder’s remedy action when it is the plaintiff’s lack of good faith. Holy Family is not the plaintiff in this matter. It has not brought an action, let alone brought one without attempting negotiations first. Highview is acting on its own behalf in this matter. It is not Holy Family’s agent, nor is it a straw-man or alter ego. Therefore, a lack of negotiations by Holy Family is irrelevant to this action. Accordingly, the Third Party Complaint must be dismissed.

LEGAL ARGUMENT

Point I

HOLY FAMILY IS NOT “NECESSARY AND INDISPENSABLE”.

Holy Family is not “necessary and indispensable” to this builder’s remedy action. The purpose of a “builder’s remedy” is to create realistic opportunities for producing a fair share of low and moderate income housing. The remedy accomplishes this by changing existing zoning ordinances so the party bringing suit can construct a project with affordable housing units. Here, Holy Family is not the party that seeks to construct/develop the project. Holy Family is not seeking to change the zoning so it can construct housing. Holy Family’s contract purchaser, Highview, is the developer. It is the party that seeks to change the zoning so that it can obtain the building permits for housing that will include affordable units. Holy Family, as present owner of the property, is not a necessary party for a determination on Highview’s cause of action. See Oceanport Holding v. Oceanport, 39 N.J. Super. 622, 625 (App. Div. 2007) where the developer/contract purchaser brought a builder’s remedy action which was decided without the owner as a party.

In this respect this action is no different from other zoning cases. The Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-1, et seq. expressly permits developers that are contract purchasers in the definition of “applicant.” See N.J.S.A. 40:55D-3 and 40:55D-4. It is a longstanding and well established precedent that contract purchasers can bring actions to enforce their rights under the MLUL without bringing in the property owners. See Sigretto v. Board of Adj. of Rutherford, 134 N.J.L. 587 (N.J. 1946); Victor Recchia Residential Construction, Inc. v. Cedar Grove Board of Adj., 338 N.J. Super. 242 (App. Div. 2001); Aronowitz v. Planning Bd., 257 N.J. Super. 347, 366 (Law Div. 1992).

R. 4:28-1(a)1 requires joinder of all persons in whose “absence complete relief cannot be accorded among those already parties... .” On its face the rule is not applicable here. Highview seeks a “builder’s remedy.” Hazlet opposes it. The relief those parties seek clearly does not require Holy Family as a party for the Court to make a determination. Under the case law, an absent party is only “necessary and indispensable” when its rights may be adversely affected. See Pressler & Verniero, Current N.J. Court Rules, Comment 3.1, R. 4:28-1. See also, Lamar-Gate v. Spitz, 252 N.J. Super. 303 (App. Div. 1991) (in a suit on a partnership debt, all partners must be named since the assets of each are available to satisfy the judgment under the Uniform Partnership Act). No decision one way or another on Highview’s builder remedy action will adversely affect Holy Family’s existing rights in the property. If the builder’s remedy is granted, and Highview proceeds, Holy Family’s sale to Highview will take place and Highview will continue with its development plans. If the builder’s remedy is not granted, Holy Family’s rights in its property will not be adversely affected- they will remain what they are now.¹

The only basis that Hazlet seems to provide for its theory that Holy Family is “necessary and indispensable” is that Holy Family is the owner of the property. There is no legal authority for that position. Indeed the contrary is the case. See Sigretto, Aronowitz and Victor Recchia, supra. Cf. Campus Associates, supra (contract purchaser’s application for a use variance was

¹ That is not to say that Holy Family does not have “standing” to join in this action if it chose to do so (See Campus Associates v. Zoning Bd. Of Adj. of Hillsborough, 413 N.J. Super. 527 (App. Div.) (owner has standing to appeal denial of use variance sought solely by contract purchaser)). But “standing” to bring or join a lawsuit and being “necessary and indispensable” for a lawsuit to be maintained are not the same. Standing refers to a party’s “ability or entitlement to maintain an action before the court.” In Re Adoption of Baby T, 160 N.J. 332, 340 (1999). A party that is “necessary and indispensable” is one in whose absence “complete relief cannot be accorded among those already parties.” R. 4:28-1(a)1.

denied. Owner appealed without contract purchaser as an additional party. The Appellate Division decided the owner had standing and could go forward without the contract purchaser.)

Here Holy Family has chosen, as permitted by the case law, not to join in the action brought by Highview. Holy Family's participation in the suit is not necessary for this Court to accord complete relief to the parties already involved. Nor will a decision by this Court adversely affect Holy Family's existing interests. Accordingly, Holy Family is not a "necessary and indispensable" party to this litigation.

Point II

HAZLET'S CLAIM THAT HOLY FAMILY FAILED TO ACT IN GOOD FAITH FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Rule 4:6-2(e) governs motions to dismiss for failure to state a claim upon which relief can be granted. The test for determining the adequacy of a pleading under the rule is whether a cause of action is "suggested" by the facts alleged. Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739,746 (1989). In deciding a motion to dismiss for failure to state a claim, the Court must examine the "legal sufficiency of the facts alleged on the face of the [pleading]." Id. The grant of a motion to dismiss is proper if the pleading does not state a legally sufficient claim. DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957). Applying the established test to Hazlet's Third Party Complaint against Holy Family here, clearly results in its dismissal.

Hazlet's only claim against Holy Family is its assertion that Holy Family has failed to act in good faith. The good faith referred to is a good faith attempt to obtain the relief sought through the builder's remedy by negotiation without litigation. See So. Burlington City NAACP v. Mt. Laurel Tp., 92 N.J. 158, 218 (1983). See also, Oceanport, supra, and Toll Bros. v. Twp. of West

Windsor, 173 N.J. 502, 537 (2002), all of which make it clear that the lack of good faith defense is only relevant as it applies to the plaintiff/developer.

Holy Family cannot be held responsible for failing to negotiate before litigating when it has not brought a litigation. Highview, the plaintiff, is a contract purchaser. Under the MLUL, it is permitted to act for itself in seeking zoning relief. N.J.S.A. 40:55D-3 and 40:55D-4. It is an independent party. It is not Holy Family's agent or alter ego. See Pirozzi Cert., ¶ 9. Simply put, because Holy Family is only the contract seller and not the developer or builder of the project, it has no duty to engage in pre-litigation negotiations with Hazlet before its contract purchaser files suit.

Hazlet cites previous proposals for the property in the Third Party Complaint. Those were different proposals at different times for different projects with different proposed developers. See Pirozzi Cert., ¶¶ 2-9. Highview is a different developer. Id. Holy Family did not take part in any negotiations with Hazlet precisely because it is not the developer.

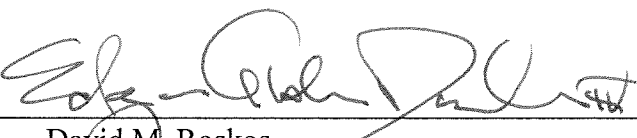
The good faith defense simply does not apply to Holy Family because it is neither the plaintiff nor the developer. There is no legal authority for Hazlet's theory that a lack of pre-litigation negotiation by a party that has neither brought a litigation nor is a developer somehow constitutes the lack of good faith which may provide a defense to a builder's remedy action. Accordingly, Hazlet's Third Party Complaint must be dismissed.

CONCLUSION

For the reasons set forth herein, we respectfully request that the Third Party Complaint against Holy Family be dismissed with prejudice.

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT, LLC
Attorneys for The Church of the Holy Family

By: 

David M. Roskos
Edgar Aiden Dunham, IV

Dated: 9/8/14

ECKERT SEAMANS CHERIN & MELLOTT, LLC

David M. Roskos, Esq. (NJ Bar ID #026561982)

Edgar Alden Dunham, Esq. (NJ Bar ID #023401988)

Physical Address: 2000 Lenox Drive, Suite 203, Lawrenceville, NJ 08648

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Telephone: (609) 392-2100

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Attorneys for Third Party Defendant, The Church of the Holy Family

HIGHVIEW HOMES, LLC,
 Plaintiff,

v.

TOWNSHIP OF HAZLET and
 PLANNING BOARD OF HAZLET.

Defendants.

and

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Defendant/Third Party
 Plaintiff,

v.

THE CHURCH OF THE HOLY FAMILY,

Third Party Defendant.

SUPERIOR COURT OF NEW JERSEY
 MONMOUTH COUNTY, LAW DIVISION,
 DOCKET NO.: MON-L-4224-15

Civil Action

**CERTIFICATION OF
 DEACON NEIL PIROZZI**

Deacon Neil Pirozzi, of full age and sound mind, hereby certifies:

1. I am a Deacon of the Catholic Church, and I am employed by the Diocese of Trenton in the Department of Property and Construction. Among my duties are assisting parishes in construction, purchasing, or sales of real property. I have been involved with the attempts by

subject of this matter. Except where otherwise noted, I have personal knowledge of what I have set forth below.

2. The property was the site of a school which has since been closed. The property has been for sale and the subject of a number of different proposals over the past six years by a number of different developers.

3. In 2010, Holy Family requested that the property be rezoned to make it more attractive to developers. Hazlet granted the request as to the front half of the property only.

4. After that initial request, all subsequent requests for zoning changes, as set forth by Hazlet in the third party complaint, were from prospective developers and purchasers of the property, some of whom were contract purchasers and some of whom were not. For instance there was no contract between Holy Family and M&M Realty Partners.

5. In none of those proposals was Holy Family intended to be the developer of the property.

6. All of those prospective developers and purchasers were independent parties acting for themselves. None were agents or alter egos for Holy Family.

7. For various reasons, none of the previous proposals for the property resulted in a sale of the property.

8. Highview Homes, LLC ("Highview") is the present contract purchaser and intended developer of the property.

9. Highview is not an agent of Holy Family or an alter ego of Holy Family. It is an independent party.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Deacon Neil Pirozzi

Dated: Sept. 6, 2016

ECKERT SEAMANS CHERIN & MELLOTT, LLC

David M. Roskos, Esq. (NJ Bar ID #026561982)

Edgar Alden Dunham, Esq. (NJ Bar ID #023401988)

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Attorneys for Third Party Defendant, The Church of the Holy Family

HIGHVIEW HOMES, LLC,

Plaintiff,

v.

TOWNSHIP OF HAZLET and
PLANNING BOARD OF HAZLET.

Defendants.

and

TOWNSHIP OF HAZLET,

Defendant/Third Party
Plaintiff,

v.

THE CHURCH OF THE HOLY FAMILY,

Third Party Defendant.

:
:
: SUPERIOR COURT OF NEW JERSEY
:
: MONMOUTH COUNTY, LAW DIVISION,
:
: DOCKET NO.: MON-L-4224-15

:
:
: Civil Action

:
:
: **CERTIFICATION OF FILING**
:
: **AND SERVICE**

I, Edgar Alden Dunham, IV, Esq., being of full age, hereby certify that on the date set forth below, the original and one copy of the within Notice of Motion, Statement of Material Facts, Brief, Certification of Deacon Neil Pirozzi and proposed form of Order, together with this Certification of Service, were sent via FEDEX to:

Central Fee Office
Monmouth County Courthouse
71 Monument Park
P.O. Box 1260
Freehold, NJ 07728-1269

and a copy of the above-referenced papers were sent via FEDEX to:

Hon. Jamie S. Perri, J.S.C.
New Jersey Superior Court
Law Division, Monmouth County
Monmouth County Courthouse
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728-1269


and a copy of the above-referenced papers were sent via email and regular mail to:

James H. Gorman, Esq.
1129 Broad Street
Shrewsbury, NJ 07702
Attorney for Defendant/
Third Party Plaintiff,
Township of Hazlet

AND

Richard J. Hoff, Jr., Esq.
Bisgaier Hoff, LLC
25 Chestnut Street, Suite 3
Haddonfield, NJ 08033
Attorney for Plaintiff
Highview Homes, LLC

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, that I am subject to punishment.



Edgar Alden Dunham, IV, Esq.

Dated: September 8, 2016

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Attorneys for Third Party Defendant, The Church of the Holy Family

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Plaintiff,

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TOWNSHIP OF HAZLET and
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Defendants.

and

TOWNSHIP OF HAZLET,

Defendant/Third Party
Plaintiff,

v.

THE CHURCH OF THE HOLY FAMILY,

Third Party Defendant.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY, LAW DIVISION,
DOCKET NO.: MON-L-4224-15

Civil Action

**ORDER DISMISSING THIRD PARTY
COMPLAINT BROUGHT BY THE
TOWNSHIP OF HAZLET AGAINST
THE CHURCH OF THE HOLY FAMILY**

This matter having been opened to the Court upon the application of Eckert Seamans Cherin & Mellott, LLC, attorneys for third party defendant The Church of The Holy Family (“Holy Family”), for an order dismissing the third party complaint brought by the Township of Hazlet (“Hazlet”) against Holy Family for failure to state a claim upon which relief can be granted, upon notice to all counsel of record and the Court having read the papers submitted in support of and in opposition to the within motion and having heard the oral arguments of counsel, if any; and for good cause shown;

It is on this _____ day of _____, 2016

ORDERED as follows:

1. Holy Family's motion is hereby **GRANTED**;
2. Hazlet's third party complaint against Holy Family is hereby dismissed for failure to state a claim upon which relief can be granted; and
3. Holy Family is not a "necessary and indispensable" party; and
4. Holy Family is not required to be joined pursuant to R. 4:28-1; and
5. A copy of this Order shall be served by defendant's counsel upon all counsel in this matter by ordinary mail within seven (7) days of receipt from the Court of a conformed copy of this Order.

Honorable Jamie S. Perri, J.S.C.

THIS MOTION IS

Opposed: _____

Unopposed: _____