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OF THE COMMITTEE ON OPINIONS

EXTECH BUILDING MATERIALS, INC.,

Plaintiff,

v.

E&N CONSTRUCTION, INC.; ARC NJ, LLC; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; LIBERTY MUTUAL INSURANCE COMPANY; ABC CORPS. 1-10, said names being fictitious; and JOHN DOES 1-10, said names being fictitious,

Defendants,

and

ARC NJ, LLC,

Third-Party Plaintiffs,

v.

ELIO FERREIRA

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

DOCKET NO. **BER-L-1643-21**

Civil Action

OPINION

Argued: **November 19, 2021**
Decided: **December 1, 2021**

HONORABLE ROBERT C. WILSON, J.S.C.

Derrick S. Freijomil, Esq. appearing on behalf of Third-Party Defendant Elio Ferreira (from Riker Danzig Scherer Hyland & Perretti LLP)

Robert T. Lawless, Esq. appearing on behalf of Third-Party Plaintiff ARC NJ, LLC (from Hedinger & Lawless LLC)

FACTUAL BACKGROUND

THE INSTANT MATTER arises out of a construction contract and a subcontractor agreement. In or around December 2017, Claremont Construction Group, Inc. ("Claremont"), a non-party, entered a construction contract (the "Construction Contract") to serve as general contractor on a construction project in Hackensack, New Jersey (the "Project"). On or about

February 7, 2018, Claremont and E&N Construction, Inc. ("E&N") entered into a subcontractor agreement, pursuant to which E&N agreed to supply concrete masonry and related services for the Project (the "Subcontract Agreement"). On or about May 31, 2019, Claremont allegedly assigned the Subcontract Agreement to ARC NJ, LLC ("ARC").

In exchange for performing "work," ARC was required to pay E&N the "Subcontract Sum" of $2,134,000.00. The Subcontract Agreement required ARC to pay E&N "[b]ased upon applications for payment submitted to the Contractor [Claremont/ARC], by the Subcontractor [E&N]" and then after "Certificates for Payment [were] issued by the Architect," the Subcontract Agreement commanded that ARC "shall make progress payments on account of the Subcontract [S]um to the Subcontractor[.]" Similarly, the Construction Contract required that "[t]he Contractor [Claremont/ARC] shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontract is entitled . . . on account of the Subcontractor's portion of the Work."

As to the amount in each Application of Payment, the Subcontract Agreement explained:

> "Each application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor and accepted by the Contractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment."

The Applications for Payment were required to "indicate the percentage of completion of each portion of the Subcontractors Work as of the end of the period covered by the application for payment" to calculate the exact amount owed based upon the schedule of values. For the final payment by ARC to E&N the Subcontract Agreement provided that "before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied."

The Construction Contract provided that "[t]he Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part[.]"

During the Project, E&N submitted monthly versions of a "Contractor's Application for Payment" to Claremont and ARC to receive payment pursuant to the schedule of values in the Subcontract Agreement. The Applications for Payment have the following provision for execution by the "Contractor," defined as E&N:

> The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work [] covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates or Payment issued and payments received from the Owner, and that current payment shown herein is now due.
>
> CONTRACTOR: E&N Construction

By: Elio Ferreira Date:

ARC claims that these Applications for Payment demonstrate that the Third-Party Defendant, Mr. Ferreira, certified that all work performed by or on behalf of E&N pursuant to its subcontract had been paid for out of previous payments received from Claremont and/or ARC.

During the Project, from February 2019 to March 2020, Extech Building Materials, Inc. ("Extech") alleges that E&N procured materials from Extech for use on the Project. Extech claims to have not been paid by E&N for those materials in the amount of $207,099.74. Extech claims that ARC terminated the Subcontract Agreement on or about April 9, 2020. Thereafter, ARC answered Extech's complaint and asserted the crossclaim against E&N for unspecified damages arising from an alleged breach of E&N's obligations under the Subcontract Agreement. ARC claims to have sustained damages of over $207,099.74 because of E&N's alleged breach of contract. ARC then filed the Third-Party Complaint alleging Mr. Ferreira committed a tort of fraud by signing the Applications for Payment in his capacity as Vice President on behalf of E&N. ARC maintains that Mr. Ferreira's alleged fraudulent misrepresentations caused it to sustain the same damages that ARC claims to have sustained due to E&N's alleged breach of contract. ARC claims that it relied on the "fraudulent" certifications of Mr. Ferriera and is now defending against Extech's complaint seeking to recover more than $200,000.00 owed by E&N because of those certifications.

For the reasons set forth below, Third-Party Defendant's Motion to Dismiss is hereby **GRANTED** without prejudice.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-

Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

"In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" See Banco Popular No. America, 184 N.J. at 183. The court may examine such a document "to see if it contradicts the complaint's legal conclusions or factual claims." Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd., 181 F.3d 410, 427 (3d Cir. 1999). One of

the purposes behind this rule "is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document." Lum v. Bank of America, 361 F.3d 217, 222 n.3 (3d Cir.), cert. deni, 543 U.S. 918 (2004)). As such, "when allegations contained in a complaint are contradicted by the document it cites, the document controls." Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015). Where an allegation in the complaint is inaccurate as evidenced by such documents, such inaccurate statements will not prevent a court from dismissing the claim. See, e.g., Maihack v. Mehl, 141 N.J. Eq. 281, 282-83 (1948) (explaining that courts have inherent power to dismiss complaint where "it is made evident by the schedule or exhibit accompanying the [complaint] that the characterization, interpretation, and legal construction sought to be ascribed to the exhibited document by the allegations of the [complaint] are patently unwarrantable.").

RULES OF LAW AND DECISION

I. ARC Cannot Pierce the Corporate Veil

A primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise. Adolf A. Berle, Jr., The Theory of Enterprise Entity, 47 Colum. L. Rev. 343 (1947); Note, Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 854 (1982) H. Henn, Law of Corporations § 146, at 250 (2d ed. 1961). Even in the case of a parent corporation and its wholly owned subsidiary, limited liability normally will not be abrogated. Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34 (1950).

Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. Lyon v. Barret, 89 N.J. 294, 300 (1982). The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, Telis v. Telis, 132 N.J. Eq. 25, 26 (E. & A. 1942), to perpetuate fraud, to accomplish a crime, or otherwise to

evade the law, Trachman v. Trugman, 117 N.J. Eq. 167, 170 (Ch. 1934); State, Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 500-01 (1983).

Personal liability may be imposed upon a controlling stockholder of a close corporation where the controlling stockholder disregards the corporate form and utilizes the corporation as a vehicle for committing equitable or legal fraud. Walensky v. Jonathan Royce Intern., 264 N.J. Super. 276, 283, (App. Div.), certify. denied, 134 N.J. 480 (1993); Marascio v. Campanella, 298 N.J. Super. 491, 502 (App. Div. 1997). A party seeking to pierce the corporate veil must establish: (1) that the entity was "dominated" by the individual owner, and (2) "that adherence to the fiction of separate corporate existence would perpetuate a fraud or injustice, or otherwise circumvent the law." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199-200 (App. Div. 2006) (citing Ventron, 94 N.J. at 500-01).

The first prong of the analysis, "domination," requires a showing that the closely held corporation or limited liability company had "no separate existence" from its owner, and acted merely as the owner's "conduit," "instrumentality," or "alter ego." Id. at 200 (citing Ventron, 94 N.J. at 501). Relevant factors include undercapitalization, insolvency, the extent of the owner's day-to-day involvement in the entity's affairs, the absence or presence of separate records and accounts, and the entities compliance or non-compliance with business formalities. Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 519 (App. Div. 2011) (quoting Verni, 387 N.J. Super. At 200); 18 Am. Jur. 2d Corporations § 54 (2004). To establish a fraud, an injustice, or other circumvention of the law, the party seeking to pierce the corporate veil must show the entity had "no independent business of its own," and the owner deliberately undercapitalized the entity, thereby rendering it judgment-proof. QTR Assocs. V. IBC Sec'ys, Inc., 353 N.J. Super. 48, 52 (App. Div. 2002) (citing Ventron, 94 N.J. at 501).

Piercing the corporate veil is a doctrine designed to address an otherwise enforceable judgment that is rendered unenforceable because the defendant is a corporate entity without sufficient assets to pay it. See Verni, 387 N.J. Super. At 199. It is an equitable remedy whereby "the protections of corporate formation are lost" to eliminate the "fundamental unfairness" that would otherwise result from a "failure to disregard the corporate form." Ibid. The doctrine's purpose is to prevent a corporation or limited liability company "from being used to defeat the ends of justice, . . . to perpetuate, to accomplish a crime, or otherwise to evade the law[.]" Ventron, 94 N.J. at 500.

In the present case, ARC cannot pierce the corporate veil to impose personal liability on Mr. Ferreira. A corporate contract between two entities, here E&N and ARC, does not impose personal liability on an officer of the entity unless certain circumstances exist. Mr. Ferreira signing, as a Vice President of E&N, for payment does not create personal liability. There is no showing that E&N had "no separate existence" from Mr. Ferreira. See Verni, 387 N.J. Super. at 200. Mr. Ferreira's actions and the contract between the entities do not give ARC the ability to pierce the corporate veil and attach personal liability on him for this matter as neither prong of the analysis is met.

II. Tort Claim is Barred by the Economic Loss Doctrine

ARC's tort claim for fraud is based on the contractual relationship between ARC and E&N. The fraudulent misrepresentation claim against Mr. Ferreira is based solely upon his execution of documents on behalf of E&N pursuant to the Subcontract Agreement. This is confirmed by ARC's admission that the measure of damages for both its breach of contract claim against E&N and its fraudulent misrepresentation claim against Mr. Ferreira are identical. ARC's efforts to sue Mr. Ferreira is an impermissible attempt to expand a contract claim into a tort claim and is barred by the Economic Loss Doctrine.

"Under New Jersey law, the economic loss doctrine defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort[.]" Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 244 (3d Cir. 2010). A fraud claim may proceed alongside a contractual relationship only when the fraud is extrinsic to the contractual obligations. See State Capital Title & Abstract Co. v. Pappas Bus. Servs., LLC, 646 F.Supp. 2d 668, 677 (D.N.J. 2009); Unifoil Corp. v. Cheque Printers and Encoders Ltd., 622 F.Supp. 268, 270-71 (D.N.J. 1985). Alleged misrepresentations made with intent to deceive and to induce the recipient of the statements to make payments under a pre-existing contract are not "extraneous to the contract, but rather a 'fraudulent non-performance of the contract itself,'" and are therefore barred from being maintained separately from a contract claim. Foodtown v. Sigma Marketing Systems, Inc., 518 F.Supp. 485, 490 (D.N.J. 1980).

The New Jersey Supreme Court has explained, only "[u]nder limited circumstances" may the participation theory be used "to hold corporate officers personally liable for tortious conduct" committed when acting on behalf of a company. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 315 (2002). Where, as in this matter, "the breach of the corporation's duty to the plaintiff is determined to be governed by contract rather than tort principles, the participation theory of tort liability [against the corporate officer] is inapplicable." Id. at 309. Thus, "irrespective of the allegations in the complaint that sound in tort, plaintiff cannot convert basic contract claims into [tort] claims in order to create a basis for the imposition of personal liability on corporate officers." Id. at 318.

The New Jersey Supreme Court in Saltiel explained what happens when the participation theory and the Economic Loss Doctrine collide. The claimant must first establish the essential predicate of the company having committed a tort, which ARC has failed to do. Even if it had, ARC would then have to show that both the duty Mr. Ferreira allegedly breached and the damages flowing therefrom are extrinsic to the contract with E&N. ARC fails on both accounts.

The Supreme Court specifically "consider[ed] whether corporate officers can be held personally liable for allegedly tortious conduct under the participation theory of liability." Saltiel, 170 N.J. at 299. There must be a tort committed by the corporation for the officer to participate in, not the commission of an independent tort by the officer on his own. "Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Id. at 316. The reason being, "irrespective of the allegations in the complaint that sound in tort, plaintiff cannot convert basic contract claims into negligence claims in order to create a basis for the imposition of personal liability on corporate officers." Id. at 318.

In Saltiel, the plaintiff contracted with the property owner to reconstruct athletic fields and subcontracted with the corporate defendant to redo turf fields. Id. at 299-301. One of the turf fields developed drainage problems, which the plaintiff had repaired by another company. Id. The plaintiff then sought to recover those repair damages by bringing a breach of contract claim against the corporate defendant and tort claims under the participation theory against two of its officers individually for their involvement in the design of the field. Id. The Supreme Court held that the plaintiff had "failed to establish that either [the corporate defendant] or [its two officers] owed an independent duty to plaintiff outside the scope of the contract" and therefore "the [participation] theory cannot be applied to the facts[.]" Id. at 315. The Supreme Court also found that the damages did "not arise from any duty imposed by law but rather result from [the corporation]'s alleged breach of contract and include" contractual damages. Id. at 318. They reasoned that "[i]rrespective of the terminology used in the complaint, . . . this case is essentially a basic breach of contract case, and that plaintiff, through her tort allegations, simply is seeking to enhance the benefit of the bargain she contracted for with [the corporate defendant]." Id. at 316.

The same rationale applies in the present matter. Mr. Ferreira cannot be held personally liable for his actions on behalf of E&N under the participation theory as ARC alleges here because they are barred by the Economic Loss Doctrine. ARC does not allege the "essential predicate" needed for the participation theory to exist, namely that there was a commission of a tort by E&N. As the Supreme Court has held, without this essential predicate, "the participation theory of tort liability is inapplicable." Id. at 309. Thus, ARC has not established the condition precedent needed to consider the participation theory.

ARC also has failed to allege that Mr. Ferreira, or E&N, violated any duty outside of the asserted contract between ARC and E&N. The only basis for making pay requests to ARC arose from the alleged contract. Mr. Ferreira was under no duty to speak absent the contractual obligations imposed by virtue of the contract between ARC and E&N. There was no independent duty, and ARC does not point to any such duty, owed by Mr. Ferreira outside the Subcontract Agreement, and ARC has not pointed to any obligation imposed by law to so speak. Rather, the United States Supreme Court held, "[o]ne who fails to disclose material information . . . commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" Chiarella v. United States, 445 U.S. 222, 228 (1980). "The virtually unanimous rule is that creditor-debtor relationships rarely give rise to a fiduciary duty." United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App. Div. 1997). Here, ARC has not pointed to any obligation imposed by law for Mr. Ferreira to speak at all. Indeed, "no duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed." Wiser v. Lawler, 189 U.S. 260, 271 (1903).

Accepting everything ARC alleges in the Third-Party Complaint as true, this Court finds that but for the existence of the Subcontract Agreement, there would be no fraud. The Subcontract

Agreement states, "[t]he Subcontractor shall pay for material, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor[.]" ARC's Third-Party Complaint is premised on the fact that ARC has been sued by Extech claiming that it has received no payments from E&N. ARC points to the alleged contractual obligations to support its tort claim against Mr. Ferreira. Thus, there is no dispute that the only duty that arises here is intrinsic to the contract. This is a breach of contract claim, and ARC is trying to impose personal liability on Mr. Ferreira claiming that he participated in a tort where no separate and independent tort exists.

ARC tries to claim that the Economic Loss Doctrine generally applies only when one party to a contract attempts to assert a tort claim against the other party to the contract. Here, there is a contract between the plaintiff, ARC, and the defendant, E&N, and this is the very contract that makes the Economic Loss Doctrine applicable. Any suggestion by ARC that the Economic Loss Doctrine does not apply here because Mr. Ferreira did not have a contract with ARC is incorrect. The New Jersey Supreme Court in Saltiel dealt with a case where the claimant sought to hold officers of the company individually liable, which claims were precluded based on the contracts between the claimant and the company. The same situation exists here and warrants the application of the Economic Loss Doctrine.

ARC is trying to create a fraud from a breach of contract hoping to hold Mr. Ferreira personally liable as an effective guarantor. "A failure to fulfill a promise may constitute a breach of contract, but it is not fraud and the non-performance of that promise does not make it so." Barry by Ross v. New Jersey State Highway Auth., 245 N.J. Super. 302, 310 (Ch. Div. 1990); see also Anderson v. Modica, 4 N.J. 383, 392 (1950). Alleged fraud in the performance of the contract is the very type of claim the Economic Loss Doctrine prevents. See Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d. 557, 563 (D.N.J. 2002). ARC negotiated its rights

and remedies in this matter through the contract with E&N, and it is pursuing the same with its contractual claims against E&N. ARC may not use the contractual duties to impose an effective guaranty on Mr. Ferreira. ARC is bound by the contractual duties and obligations it negotiated with E&N and may not use them to expand liability to Mr. Ferreira via a supposed tort liability. Bracco, 226 F. Supp. 2d at 565 ("The economic loss doctrine is designed to place a check on limitless liability . . . and establish clear boundaries between tort and contract law.").

The damages ARC seeks to recover arise out of and include the same contractual damages it seeks from E&N. ARC's third-party claim in tort against Mr. Ferreira seeks three of the exact same contractual damages from Mr. Ferreira that it seeks from E&N in its contractual claims. Not only are ARC's claims against Mr. Ferreira contractual, but they are also the same, albeit a subset, as the contractual claims against E&N. Just as the New Jersey Supreme Court held in Saltiel, since ARC's damages alleged against Mr. Ferreira are intrinsic to the contract, it cannot seek to hold him personally liable under the participation theory.

CONCLUSION

For the aforementioned reasons, Third-Party Defendant's Motion to Dismiss is **GRANTED WITHOUT PREJUDICE.**