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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5650-10T4

WIATER BUILDING & DESIGN, INC.,

Plaintiff,

v.

GEORGE GUTIERREZ and NEREIDA
GUTIERREZ,

Defendants/Third-Party
Plaintiffs-Appellants/
Cross-Respondents,

v.

JAMES WIATER and ROBERT BRANCO,

Third Party Defendants-
Respondents/Cross-Appellants.

WIATER BUILDING & DESIGN, INC.,

Plaintiff,

v.

BOA CONSTRUCTION, ECK AIR, POWER
STONE, BILL LABOCKI, HOME DESIGN
TILE & MARBLE, AJ RELIABLE, INC.,
DEMKO ELECTRIC, AJ STAIRS, TONY
AMPORT, CLIFTON ORNAMENTAL
IRONWORKS INC., PINNACLE PLUMBING
& HEATING,

Defendants.

Argued: December 5, 2012 - Decided: January 3, 2013

Before Judges Axelrad and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2374-06.

Malcolm Blum argued the cause for appellants/cross-respondents.

Mark R. Sander argued the cause for respondents/cross-appellants (Sander, Carson & Lane, P.C., attorneys; Mr. Sander, of counsel and on the brief).

PER CURIAM

Defendants George and Nereida Gutierrez appeal from an order granting summary judgment dismissing their complaint against third-party defendants, James Wiater and Robert Branco, the principals of Wiater Building and Design, Inc. (referred to as the principals and the corporation, respectively), alleging breach of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to - 20 in connection with a home improvement contract entered into with the corporation. Defendants argue the principals are personally liable for damages, the facts of the case justify piercing the corporate veil, and disputed material factual issues precluded summary judgment. The principals filed a protective cross-appeal, challenging the court's denial of their motion to amend the complaint to add defendants' design architect, The Montoro Architectural Group, as a defendant. As we affirm the appeal, the cross-appeal is moot and need not be addressed.

I.

We recite the record in the light most favorable to defendants, the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On October 25, 2001, defendants entered into a contract with the corporation for extensive improvements and additions to their home located in Saddle River. The total contract price was about $976,000. The contract expressly stated that it "represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral."

George Gutierrez (Gutierrez) certified he retained the corporation to perform the home improvement job because of his twenty-year personal relationship with the principals, who "had previously built three or four McDonalds restaurants for [him], and had also previously remodeled a prior residence." They "were also personally well known through an association of owners of McDonald's restaurants, of which [he] was a long time member." He further certified the principals had previously personally supervised the construction work and the subcontractors and hired them to undertake this substantial home improvement job based on both principals' representations "that they would personally supervise the job, see that it was

performed in accordance with proper construction requirements, and deliver a good finished product."

On December 30, 2002, the corporation obtained a Temporary Certificate of Occupancy. Whether the corporation completed its contract at that time and the remaining items needed to be completed by defendants' subcontractors, as represented by the principals, or whether a year afterwards the job was still not complete as stated by Gutierrez, such facts are not pertinent to this appeal.

On July 24, 2006, the corporation filed a complaint against defendants for collection of the unpaid balance of $34,380 pursuant to the terms of the contract. Defendants filed an answer and counterclaim, alleging the corporation did not complete the work it agreed to perform and refused to "finish the work which it left undone, and to correct the work which it performed in a shoddy and unworkmanlike manner."[1]

By order of January 23, 2009, the court denied defendants' motion for leave to file a third-party complaint against the principals. We granted defendants' motion for leave to appeal and reversed and remanded by order of March 9, 2009. On remand,

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[1] The corporation filed a separate suit against most of its subcontractors. That suit was consolidated with this action and later dismissed. See infra.

pursuant to court order, defendants filed the third-party complaint and the principals filed an answer.

In April 2009, the corporation filed a motion to amend its complaint to add The Montoro Architectural Group as a defendant, which Judge Edward M. Oles denied by order of May 1, 2009. The reconsideration motion was also denied.

On June 11, 2009, the principals filed a notice of motion for summary judgment, and defendants filed opposition. Oral argument was held on July 17, 2009, and on August 14, 2009, by order and opinion, Judge Oles granted the summary judgment motion, dismissing the third-party complaint. He found the contract "reflects that there are no personal guarantees made by any of the corporate officers relative to the work to be performed or any personal undertaking by" the principals. Even applying an expansive view of the parol evidence rule as articulated in Conway v. 287 Corporate Center Assocs., 187 N.J. 259 (2006), the judge found, as a matter of law, the contract to be unambiguous on its face and the sole contracting parties to be defendants and the corporation.

The judge concluded that to permit defendants to "assert that there were certain warranties or guarantees made by the individual corporate officers which would hold them personally liable would introduce extrinsic evidence to vary the terms of

the contract" and "twist or distort the obvious meaning of the parties." Accordingly, he found the principals were entitled to judgment as a matter of law.

By order of September 30, 2009, we denied defendants' motion for leave to appeal. Prior to the start of trial of the consolidated actions, defendants settled their counterclaim against the corporation, which included dismissal of all claims against all parties involved in the consolidated actions, except for defendants' claims against the principals that are the subject of this appeal. The appeal and cross-appeal ensued.

II.

On appeal, defendants argue:

> POINT I
> THE THIRD-PARTY DEFENDANTS ARE PERSONALLY LIABLE FOR THE DAMAGES SUFFERED BY THE THIRD-PARTY PLAINTIFFS UNDER THE CONSUMER FRAUD ACT.
>
> POINT II
> THE FACTS OF THIS MATTER JUSTIFY THE PIERCING OF THE CORPORATE VEIL.
>
> POINT III
> THE THIRD-PARTY DEFENDANTS FAILED TO MEET THEIR BURDEN FOR SUMMARY JUDGMENT.

On their cross-appeal, the principals challenge the court's denial of the corporation's motion to amend its complaint.

We review summary judgment de novo and apply the same standard as the trial court under Rule 4:46-2. Liberty Surplus

Ins. Corp. v. Nowell Amoroso P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In doing so, we view the evidence in the light most favorable to the non-moving party, Brill, supra, 142 N.J. at 540, and review the legal conclusions of the trial court de novo, without any special deference, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We initially discuss defendants' third argument, namely, that genuine issues of fact precluded the entry of summary judgment. According to defendants, "at this posture of the [l]itigation, [their] claims against [the principals] stand unrefuted[,]" which raises a debatable question as to CFA violations. They also generally state that Judge Oles ignored their right to be heard on their CFA claim "by wrongfully relying on his own personal belief about the [CFA] rather than following the law." Neither of these arguments are persuasive.

Defendants alleged the following against the principals in their third-party complaint:

> 5. On or about October 25, 2001, [defendants], <u>subsequent to discussions, with, and after receiving representations from, the [principals</u>], [defendants] entered into a Contract with the [corporation], wherein the [corporation] agreed to perform extensive home improvement work at the [defendants'] residence.
>
> . . . .
>
> 7. <u>Because of determinations made by [the principals</u>], the [corporation] took an extraordinary amount of time to perform the home improvement job, substantially beyond the time period provided for in the Contract between the parties.
>
> 8. <u>Further, because of [the principals'</u>] <u>determinations</u>, the [corporation] did not complete the work that it agreed to perform for the [defendants], causing the [defendants] to incur the costs of hiring other contractors to complete the work, and supply the materials, left undone by the [corporation].
>
> 9. Additionally, substantial portions of the work performed by the [corporation], materials supplied, at [defendants'] home, was performed in a shoddy and unworkmanlike manner. <u>This shoddy and unworkmanlike work</u>, <u>and materials, were the direct result of the failure of the [principals] to properly supervise the subcontractors that they hired to perform the work, and supply the materials, at [defendants'] home</u>. The [defendants] have spent, and will be required in the future to spend, large sums of money to repair, redo, and replace the shoddy and unworkmanlike work performed, and materials supplied, by the [corporation], <u>by</u>

> way of [the principals'] misfeasance and/or nonfeasance.
>
> 10. [Defendants] requested the [principals] to finish the work which was left unfinished, to correct the work that was performed in a shoddy and unworkmanlike manner, and to supply the materials which were incomplete, but the [principals] failed and refused to do so.
>
> 11. [Defendants] entered into the subject home improvement contract with [the corporation] based upon the promises of [the principals] to supply to the [defendants] a home improvement job that would be satisfactory for the purposes intended, and that would provide the [defendants] with satisfactory improvements to their home.
>
> 12. [The principals] failed to carry out this agreement, and their promises were willfully and knowingly false.
>
> 13. Said promise were made by the [principals] for the purpose of getting the [defendants] to pay a substantial and premium price for [the corporation] and the [principals'] services and materials.
>
> [(Emphasis added).]

Defendants claimed these actions constituted violations of the CFA.

In Gutierrez's certification in opposition to summary judgment, as previously stated, he noted his longstanding personal relationship with the principals; his satisfaction with their performance on prior jobs, which included their personal supervision of construction work and the subcontractors; and

their promise to do the same on this job, which was the reason he retained the corporation to undertake this substantial home improvement. He elaborated:

> 7. Unfortunately, it turned out that these two men did not deliver in accordance with their personal representations. . . . That job was supposed to be completed nine (9) months later. However, eighteen (18) months later the job was still not complete. (Meanwhile my wife and I had to arrange to live elsewhere during most of that time period).
>
> 8. At the end of the eighteen months the job was still incomplete. But, most importantly, the job was performed in a shoddy and unworkmanlike manner, and substantial portions of the materials that were supplied were either insufficient or inferior. Contrary to their representations, neither [principal] <u>properly supervised the job or the subcontractors</u>. Their subcontractors did not complete their work, showed up to perform their work only sporadically, and left the work that they did in a haphazard and unworkmanlike manner. <u>This situation was caused directly by the failure to properly supervise those subcontractors</u>.
>
> [(Emphasis added).]

Gutierrez attached two expert reports, which he alleged "explain the totally irresponsible conditions created by the utter failure of [the principals] to honor their representations" to defendants. He alleged these major defects began to manifest themselves while the principals were "supposed to be on the job site," were becoming increasingly worse over

time, and were "caused by the constant cutting of corners, cheapness, and shoddy work[,] [a]ll designed to personally benefit [the principals], at [his] expense." One report opined that "[t]he workmanship on this project is very much sub-par to the point of being negligent[,]" additional posts for point loads and additional beams were missing, and many of the structural items caused cosmetic problems from cracking sheetrock to popping floor tiles. The other report opined that "[c]ontinuing evidence of poor workmanship abounds[,]" and "[m]isalignment of posts along with the extremely poor workmanship observed will lead to eventual movement of members, as loads are subject to them." This is the record that forms our analysis of the summary judgment motion.

Judge Oles properly concluded as a matter of law that the parol evidence rule precluded looking beyond the unambiguous language of the contract. Defendants' home improvement contract was solely with the corporation and imposed no obligations on the principals to be on site or to supervise subcontractors. Thus, defendants were unable to present extrinsic evidence of specific promises by the principals to which they could be individually accountable on a breach of contract claim.

Instead, defendants urge that the CFA supersedes the parol evidence rule and affords them a cause of action against the

principals. They emphasize that N.J.A.C. 13:45A-16.1 implements the provisions of the CFA and makes it applicable to home improvement "sellers," which includes corporations and "their officers, representatives, agents and employees." See N.J.A.C. 13:45A-16.1A.

The enactment of the CFA was "aimed basically at unlawful sales and advertising practices designed to induce customers to purchase merchandise or real estate." Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 270 (1978). The Supreme Court has interpreted a CFA claim to include three elements: "(1) unlawful conduct . . .; (2) an ascertainable loss . . .; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389 (2007) (quoting N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied, 178 N.J. 249 (2003)).

Further defining what constitutes the unlawful conduct element, the CFA provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation . . . in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as

> aforesaid . . . is declared to be an unlawful practice . . . .
>
> [N.J.S.A. 56:8-2.]

The New Jersey Supreme Court has identified three general categories of consumer fraud violations — affirmative misrepresentations, knowing omissions, and regulatory violations. Allen v. V & A Bros., Inc., 208 N.J. 114, 131 (2011); Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556 (2009); Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994).

An "unconscionable commercial practice" satisfies the unlawful act requirement under N.J.S.A. 56:8-2. Although the term "unconscionable commercial practice" is not defined in the CFA, the Supreme Court has held it to be an "amorphous concept obviously designed to establish a broad business ethic." Cox, supra, 138 N.J. at 18 (quoting Kugler v. Romain, 58 N.J. 522, 543 (1971)). The word "unconscionable" is generally interpreted liberally to "effectuate the public purpose of the CFA." Assocs. Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 278 (App. Div. 2001) (quoting Kugler, supra, 58 N.J. at 543). However, it implies a "lack of 'good faith, honesty in fact and observance of fair dealing.'" Cox, supra, 138 N.J. at 18 (quoting Kugler, supra, 58 N.J. at 544). Moreover, whether a particular practice is unconscionable must be determined on a

case-by-case basis. Troup, supra, 343 N.J. Super. at 278 (citing Kugler, supra, 58 N.J. at 543).

A breach of contract is not per se unconscionable and does not alone violate the CFA. See Cox, supra, 138 N.J. at 18 (reiterating that "'a breach of warranty, or any breach of contract, is not per se unfair or unconscionable . . . and a breach of warranty alone does not violate a consumer protection statute[]'")(quoting D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 25 (App. Div. 1985)). See also Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 601 (App. Div. 1990), aff'd o.b., 124 N.J. 520 (1991). The Supreme Court reasoned that any breach of contract is unfair to a non-breaching party, but contract law already provides remedial damages in those circumstances. Cox, supra, 138 N.J. at 18; see also D'Ercole Sales, Inc., supra, 206 N.J. Super. at 31.

Thus, in order to justify the much larger treble damages provided under the CFA, the Supreme Court explained that:

> the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach. DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69, 72 (App. Div.) (finding that breach of warranty in supplying defective furniture and denying that defect existed was not unconscionable), certif. denied, 117 N.J. 126 (1989); D'Ercole Sales, supra, 206 N.J. Super. at 31 (holding that breach of warranty for

> malfunctioning tow truck and refusal to repair was not unconscionable practice).
>
> [Cox, supra, 138 N.J. at 18.]

See also Chattin, supra, 243 N.J. Super. at 601.

The claims asserted by defendants in their complaint and Gutierrez's affidavit sound basically in contract, namely shoddy workmanship and failure to timely complete the project. Defendants' vague claims of "use" of "insufficient or inferior materials" are unlike the allegations in New Mea Construction Corp. v. Harper, 203 N.J. Super. 486 (App. Div 1985), on which defendants rely. There, the defendants-homeowners' counterclaim alleged the principal consumer fraud or deception was the contractor's substitution of substandard lumber in the framing of their house, which was a lesser grade than prescribed by the written contract; the contractor was to provide all labor and materials. Id. at 498, 500.

This was a case of first impression, and we concluded the CFA "applies to a builder of a single-family home who uses substandard materials in violation of a contract," reasoning the materials used in the house was "merchandise sold" to the owners within the contemplation of N.J.S.A. 56:8-1(c) and (e). Id. at 501-02. As the Law Division judge found the CFA was inapplicable, we reversed and remanded the CFA counterclaims for the judge to review and determine whether the builder was liable

under the Act, and further directed the judge to assess damages against the principal if he found she "meets the test for liability under the Act."[2] Id. at 502.

Although the CFA can impose liability upon an individual, that individual can only be liable for his or her own affirmative acts or knowing omissions. Allen, supra, 208 N.J. at 131-33. (2011). Such an individual may not be held liable under the CFA "merely because of the act of the corporate entity." Id. at 132. The Supreme Court expressly instructed that "individual liability for a violation of the CFA will necessarily depend upon an evaluation of both the specific source of the claimed violation that forms the basis for the plaintiff's complaint as well as the particular acts that the individual has undertaken." Id. at 136.

Dissimilar to the present case, there the homeowners' CFA claim against the corporate building entity, individual officers, and employee was premised on three "Home Improvement Practices" regulatory violations, see N.J.A.C. 13:45A-16.1 to -16.2, which were specifically pled. Id. at 121-22, 128-30. The Court found the record was "insufficient to permit a conclusive

[2] The crux of the homeowners' counterclaim against the principal was that she negligently supervised the construction of the premises, which included the use of lesser quality materials than specified in the contract. Id. at 494. The specific terms of the contract are not contained in the opinion.

analysis of whether any of the individually-named defendants engaged in acts that suffice for this purpose" and thus remanded for further proceedings. Id. at 136.

In contrast, we are satisfied that in the present case the summary judgment record clearly demonstrates defendants failed to produce sufficient credible evidence that the principals personally committed any affirmative acts or knowing omissions warranting liability under the CFA, even when viewed in the light most favorable to defendants. Defendants' pleadings and Gutierrez's certification alleges no "substantial aggravating circumstances" beyond breach of contract, no knowing omissions or specificity of fraudulent conduct by the principals, or any specific "Home Improvement Practices" regulatory violations. Viewing the record under a Brill standard, the crux of defendants' CFA claims against the principals, i.e., failure to remain onsite and to properly supervise the subcontractors, which are not required by the contract, are insufficient acts to suffice for liability as a matter of law.

Defendants next urge that it would be "factually and legally unjust" for [the principals] to claim they are not personally liable for their malfeasance," since they failed to honor their representations and left defendants with "a home improvement job that is literally falling apart." They also

emphasize that the principals used their personal relationship with defendants to procure the contract, and accordingly they cannot hide behind the veil of their corporation. We disagree.

Courts generally will not pierce the corporate veil unless there is fraud or injustice. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008). However, "[t]he issue of piercing the corporate veil is submitted to the factfinder, unless there is no evidence sufficient to justify disregard of the corporate form." Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006), certif. denied, 189 N.J. 429 (2007) (internal citation omitted).

"The power of New Jersey courts to pierce the corporate veil is well established." Stochastic Decisions v. DiDomenico, 236 N.J. Super. 388, 393 (App. Div. 1989), certif. denied, 121 N.J. 607 (1990). The doctrine of piercing the corporate veil prevents "an independent corporation from being used to defeat the ends of justice." Ibid. "[T]he party seeking an exception to the fundamental principle that a corporation is a separate entity from its principal bears the burden of proving that the court should disregard the corporate entity." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996) (internal citation omitted).

We have explained the liability of corporate officers as follows:

> "A director or officer of a corporation does not incur personal liability for its torts merely by reason of his [or her] official character, but, a director or officer who commits a tort or who directs the tortious act to be done, or participates or cooperates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort."
>
> [Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 381-82 (App. Div. 1995).]

Pursuant to Tung, defendants have the burden of proving that the corporate veil should be pierced. Even if the work performed by the corporation were "shoddy and unworkmanlike," the fact remains that the contract did not impose any specific obligations on the principals to be present onsite on a regular basis or to personally supervise the subcontractors. Pursuant to the parol evidence rule, the introduction of any representations made by the principals prior to the formation of the contract is forbidden. Conway, supra, 187 N.J. at 368. If defendants wanted the principals to personally perform such tasks, they should have included it in the contract. Moreover, it is not unlawful to use a personal relationship to procure a contract. Accordingly, defendants presented no evidence that the principals committed a tort or directed a tortious act to be

done. Charles Bloom & Co., supra, 279 N.J. Super. at 381. Thus summary judgment was appropriate, since there was no evidence sufficient to justify disregard of the corporate form. Verni, 387 N.J. Super. at 199.

Accordingly, there has been no fraud or injustice. Richard A. Pulaski Constr. Co., supra, 195 N.J. at 472; Lyon v. Barrett, 89 N.J. 294, 300 (N.J. 1982). The corporation is responsible for any deficiencies in the work it performed. Defendants had the opportunity to assert their claims against the corporation but instead chose to settle.

As we are satisfied summary judgment was properly entered in favor of the principals based on the parol evidence rule and the CFA, we need not reach the principals' alternative argument that the complaint against them was also barred by the statute of limitations. Nor do we need to address their protective cross-appeal challenging the court's denial of their motion to amend the complaint.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION