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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2645-10T3

ELIAS KORT and ANTONELLA KORT,

Plaintiffs-Appellants,

v.

RENIER VAN ASWEGEN, individually,  
CLARA VAN ASWEGEN, individually  
and CREATIVE SOLUTIONS AND  
SERVICES, LLC,

Defendants-Respondents.

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Submitted September 26, 2011 - Decided November 1, 2011

Before Judges Sabatino and Ashrafi.

On appeal from Superior Court of New Jersey,  
Law Division, Somerset County, Docket No.  
L-1104-10.

Cohn, Bracaglia & Gropper, P.C., attorneys  
for appellants (Jill Sara Carlson, on the  
brief).

Respondents have not filed a brief.

PER CURIAM

Plaintiffs appeal from a default judgment on their claims  
of breach of contract and Consumer Fraud violations on a home  
improvement contract. The Law Division granted plaintiffs  
judgment for a total of \$201,361.21, which included attorneys'

fees and costs, but only against the corporate defendant and only on plaintiffs' claim for breach of contract. The court dismissed plaintiffs' claims against the individual defendants and made no award on their claims of Consumer Fraud violations.

We affirm the judgment in part and reverse in part. We remand to the Law Division for entry of a modified judgment and order of dismissal.

I.

Plaintiffs filed their complaint on June 25, 2010, and served all three defendants. Defendants did not file an answer or otherwise respond to the complaint. Default was entered as to all defendants on August 16, 2010. Plaintiffs then moved for entry of final judgment, submitting certifications, documentary evidence, and photographs to prove their claims.

According to plaintiff Elias Kort's certification, "[d]efendants held themselves out as being experienced contractors." Defendant Renier van Aswegen told plaintiffs that he, defendant Clara van Aswegen, and his stepson were involved in the business. According to Elias Kort, Renier van Aswegen referred to "a 'family business' in order to reassure [plaintiffs] of the establishment of the Company and that the Company's operations did not hinge on one person alone." Plaintiffs submitted a document titled New Jersey State Business

Gateway Service, Corporate and Business Information Reporting, which identified Renier and Clara van Aswegen as the officers, directors, or members of Creative Solutions and Services, LLC.

Plaintiffs' proofs showed that they entered into a six-page contract with Creative Solutions on October 14, 2009, for an addition to their house in Hillsborough. Creative Solutions agreed to construct a second floor and to renovate parts of the existing first floor, setting out in detail the work to be done. Plaintiffs agreed to pay \$215,000 in ten installments. Renier van Aswegen signed the contract as president of Creative Solutions. The contract made no reference to Clara van Aswegen.

The contract deviated in several respects from statutory and regulatory provisions applicable to home improvement contracts of more than \$500. It did not contain the registration number of Creative Solutions as the contractor, or a copy of its commercial general liability insurance policy, as required by N.J.S.A. 56:8-151(a). It did not designate a start or end date for the construction work, as required by N.J.A.C. 13:45A-16.2(12)(iv). It did not identify the products and materials that would be used in the remodeling project and did not include product guarantees and warranties, as required by N.J.A.C. 13:45A-16.2(12)(ii) and (vi).

Elias Kort's certification stated that workers came only intermittently to plaintiffs' house to work after the first few weeks, and the work ceased entirely in April 2010 before the job was completed. In April, Creative Solutions removed equipment from the job site, and subcontractors informed plaintiffs they would cease work because they had not been paid. At that time, plaintiffs had paid \$160,000 toward the contract price. Plaintiffs made all payments by check payable to Creative Solutions, and the checks were deposited into a checking account at Fleet Bank in the name of Creative Solutions.

Plaintiffs were compelled to hire other contractors to complete the work and to fix deficient work that had been done by Creative Solutions. The other contractors estimated the cost to complete the job and make repairs to be an additional \$260,000. At the time of their proofs on default judgment, plaintiffs had paid new contractors more than \$75,000 of the additional estimated cost. As of November 2010, the project was still not completed, and plaintiffs were unable to occupy most of the house.

Plaintiffs' complaint charged breach of contract, faulty workmanship, breach of warranties, other common law causes of action, and violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20. Plaintiffs sought trebling of their losses and

reimbursement of their attorneys' fees under the Consumer Fraud Act. See N.J.S.A. 56:8-19. They had paid a retainer of \$5,000 for the services of their attorneys as well as other fees and expenses of litigation. Plaintiffs claimed they were entitled to a judgment totaling more than one million dollars.

The Law Division considered plaintiffs' proofs and issued a written decision and judgment on December 17, 2010. The court found that plaintiffs had proven breach of contract because the work had not been completed and there were deficiencies in the work that was done. It also found that Consumer Fraud violations were committed in that the contract did not comply with mandatory regulatory provisions for home improvement contracts. The court found that plaintiffs had proven damages of \$197,225.32 in paid and anticipated costs of completing and repairing the construction project beyond the original contract price of \$215,000.00. Plaintiffs had incurred attorneys' fees of \$3,905.89 for the services of their attorneys through seeking default judgment, and their litigation costs were \$230.00.

But the court also concluded that the regulatory Consumer Fraud violations were not the cause of plaintiffs' losses, and that plaintiffs had not shown that either individual defendant was liable for breach of contract or Consumer Fraud violations. Therefore, the court dismissed with prejudice plaintiffs' claims

against the Van Aswegens and entered judgment solely against Creative Solutions for a total of \$201,361.21.

## II.

Plaintiffs appeal, contending that the individual defendants are liable for Consumer Fraud violations and that the "corporate veil" should have been pierced to hold the Van Aswegens personally liable for breach of contract. Plaintiffs also argue that their losses should have been trebled under N.J.S.A. 56:8-19 of the Consumer Fraud Act.

Several months after the Law Division's rulings in this case, the Supreme Court issued its opinion in Allen v. V & A Bros., Inc., 208 N.J. 114 (2011), which elaborated on the liability of individual officers and employees of a corporation for violations of the Consumer Fraud Act. The Court restated the three general categories of Consumer Fraud violations – affirmative misrepresentations, knowing omissions, and regulatory violations. Id. at 131 (citing Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556 (2009), and Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994)). Individual liability has been found to apply to any person, including an individual working for a corporation, who violates the Consumer Fraud Act by means of affirmative misrepresentation or knowing omission. Id. at 131-32; see, e.g., Gennari v. Weichert Co. Realtors, 148 N.J.

582, 609-10 (1997); New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 502 (App. Div. 1985); Hyland v. Aquarian Age 2,000, Inc., 148 N.J. Super. 186, 193 (Ch. Div. 1977). The more complicated issue is whether individual corporate officers and employees are liable for regulatory violations, in particular, because the corporation is held strictly liable under the Consumer Fraud Act for such violations. See Allen, supra, 208 N.J. at 133.

In Allen, the Court rejected a definitive legal conclusion on that issue. It held that "individual liability for regulatory violations ultimately must rest on the language of the particular regulation in issue and the nature of the actions undertaken by the individual defendant." Ibid. In addition, the Court drew a distinction between employees of a corporation who have no control over the practices that violate regulations and the principals of a corporation who "may be broadly liable, for they are the ones who set the policies that the employees may be merely carrying out." Id. at 134.

The Court considered the liability of corporate principals and officers as discussed in Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 302-05 (2002), a case pertaining to common law causes of action for breach of contract and negligence. It concluded that individual liability under the Consumer Fraud Act

is consonant with individual liability under tort law, which has recognized a "participation theory" in holding individuals liable for tort when acting on behalf of a corporation. Allen, supra, 208 N.J. at 135-36 (citing Saltiel, supra, 170 N.J. at 303, 305). An individual may be held personally liable if he or she participated and had sufficient involvement in the commission of a tort or a Consumer Fraud violation. Ibid.

In this case, Renier van Aswegen participated directly in the regulatory violations. He executed a home improvement contract that omitted required provisions as listed previously. He allegedly represented to plaintiffs that Creative Solutions was a small family business, thus indicating his personal responsibility for the contents of the contract. Moreover, as president of the company, and in the absence of contrary evidence, he could be held liable for setting the unlawful company policies with respect to the missing contract provisions. The proofs demonstrated that Renier van Aswegen individually violated the Consumer Fraud Act.

Although Clara van Aswegen was also a principal of Creative Solutions who may have had responsibility for the contents of the contract, plaintiffs had no evidence of her direct participation or involvement. It is unlikely that the Supreme Court's discussion of "broad" liability of corporate principals



was intended to hold principals personally liable without evidence of a sufficient role in instituting the corporate policies or practices that violate the regulations. Otherwise, principals of a corporation of any size could be personally sued and held liable under the Consumer Fraud Act for every regulatory violation, no matter how remote from their personal conduct or responsibility. In Saltiel, supra, 170 N.J. at 303, the Court stated: "the essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort."

On the record presented, plaintiffs did not have evidence that Clara van Aswegen was sufficiently involved in preparing the contract or instituting the practices and policies of Creative Solutions that resulted in a deficient contract. We conclude the Law Division correctly held that plaintiffs had not proven Clara van Aswegen's personal liability under the Consumer Fraud Act.

Furthermore, we find no error in the Law Division's conclusion that the evidence did not demonstrate a nexus or causal connection between plaintiffs' losses and the regulatory Consumer Fraud violations. See Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988) (ascertainable loss must

be a result of the unlawful conduct); Ramanadham v. N.J. Mfrs. Ins. Co., 188 N.J. Super. 30, 33 (App. Div. 1982) (plaintiff must establish a causal relationship between any ascertainable loss and the unlawful practice). Plaintiffs' losses of \$197,225.32 were attributable only to the failure of Creative Solutions to complete the job and to the deficient work that was done, not to the regulatory violations in the formation of the written contract. Their evidence showed damages caused by breach of contract, not ascertainable loss caused by violations of the Consumer Fraud Act.

However, the attorneys' fees of \$3,905.89 were recoverable only under the Consumer Fraud Act, not for breach of contract. Plaintiffs' failure to prove an ascertainable loss caused by the Consumer Fraud violation is not a bar to their recovery of attorneys' fees and costs under the Act. See Weinberg v. Sprint Corp., 173 N.J. 233, 252-53 (2002); Cox, supra, 138 N.J. at 24-25. Both Creative Solutions and Renier van Aswegen should have been held liable for plaintiffs' reasonable attorneys' fees and costs, even if they were not subject under that Act to trebling of plaintiffs' losses.

The Law Division also concluded correctly that plaintiffs did not prove sufficient facts to pierce the corporate veil and to hold either of the Van Aswegens liable for breach of

contract. The evidence was insufficient to conclude that the individual defendants and their business "had no separate existence" and therefore the individuals could not insulate themselves from the contractual obligations of Creative Solutions. See N.J. Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 500-01 (1983).


However, because defendants defaulted and did not participate in the litigation, plaintiffs did not have an opportunity to obtain discovery from them regarding the operation of their family business. Plaintiffs were not able to depose defendants or to review their business records. They did not have a separate source of evidence that would justify piercing the corporate veil. Plaintiffs argue that they may yet obtain such evidence through post-judgment discovery in pursuit of execution of their judgment. See R. 4:59-1(e).

Remedies may be available to plaintiffs if newly discovered evidence shows that the individual defendants "so dominated [Creative Solutions] that it had no separate existence but was merely a conduit" for them, and thus it would be unjust to permit the corporate entity to insulate the individual defendants from liability. See Ventron Corp., supra, 94 N.J. at 501. So that plaintiffs are not foreclosed from pursuing such remedies, their claims of individual liability that were not

supported by sufficient proofs should have been dismissed without prejudice rather than with prejudice. Dismissal without prejudice would more appropriately permit plaintiffs to move under Rule 4:50-1(b) to modify the judgment and expand its reach to the individual defendants if they discover new evidence that by due diligence they could not have learned earlier. We make no determination here regarding whether the Law Division ultimately would have a sound basis to open and modify the judgment, only that a dismissal with prejudice as to the individual defendants was not required at this time.

We affirm the Law Division's judgment in part and reverse it in part. We remand to the Law Division for entry of a modified judgment, holding both Creative Solutions and Renier van Aswegen liable for attorneys' fees and costs under the Consumer Fraud Act and dismissing without prejudice any additional individual claims of plaintiffs. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION