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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4672-12T4

JOSEPH OKOLITA and
SANDRA OKOLITA,

Plaintiffs-Appellants,

v.

BBK GROUP, INC., BK GROUP,
LLC, and BRIAN KIEPER,

Defendants,

and

JERRY RUSSO,

Defendant-Respondent.

Submitted June 3, 2014 – Decided October 8, 2014

Before Judges Espinosa, Koblitz and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-807-12.

Ehrlich, Petriello, Gudin & Plaza, attorneys for appellants (John Petriello, on the brief).

Noel E. Schablik, P.A., attorney for respondent.

PER CURIAM

Plaintiffs appeal from an order that granted summary judgment to defendant Jerry Russo, dismissing their complaint as to him. We affirm.

During the period from July to November 2010, plaintiffs met with Brian Kieper[1] and received estimates from BBK Group, Inc. (BBK) and BK Group, LLC (BK) for work to be performed at their home. The work was commenced without the execution of a signed written agreement, a violation of N.J.A.C. 13:45A-16.2(a)(12). Plaintiffs paid BBK and BK a total of $75,060 for the work identified in the various estimates.

Plaintiffs filed an eight-count complaint. They alleged claims of breach of contract, negligence, breach of express and implied warranties and unjust enrichment against BBK and BK. Plaintiffs alleged that BBK's corporate veil should be pierced to impose liability upon Russo; and that BK's corporate veil should be pierced to impose liability upon Kieper. The third count of the complaint alleged that all defendants committed acts in violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, which included the following:

- Defendant BBK performed work without presenting a written contract to plaintiffs

[1] Based upon his certification, it appears that defendant's correct name is Keiper. We use Kieper to be consistent with the caption in this matter.

which was signed by BBK, BK, plaintiffs or defendants.

- Defendant BK misrepresented itself to the seller on the December 14 and January 9 estimates as defendant BBK.

- Defendants failed to include the dates or time period on or within which the work was to begin and be completed, in violation of N.J.A.C. 13:45A-16.2(12)(iv).

- Defendants failed to provide a statement of any guarantee or warranty with respect to any product, materials, labor or services, in violation of N.J.A.C. 13:45A-16.2(12)(vi).

- Defendants failed to disclose that the entity doing the work would be defendant BK, in violation of N.J.A.C. 13:45A-16.2(13)(i).

- Defendants BBK and BK failed to identify their home improvement license number.

- Defendant BBK failed to disclose to plaintiffs that its home improvement license expired, and was not renewed, on December 31, 2010.

- Defendants failed to perform the work in a timely manner, and failed to provide timely written notice to plaintiffs of reasons beyond the defendants' control for any delay in performance, and when the work would be completed, in violation of N.J.A.C. 13:45A-16.2(7)(ii)(iii).

- Defendants failed to comply with applicable state and local building codes.

- Defendants demonstrated a total lack of good faith and fair dealing as set forth above and by not properly responding to

> plaintiffs' requests to correct its faulty and deficient work.

An answer and cross-claim against BK and Kieper was filed on behalf of BBK and Russo. Referring to the allegation in the complaint that Kieper had claimed to be a representative of BBK, the cross-claim stated that Kieper had no authority to act on behalf of either Russo or BBK. The cross-claim also alleged that BBK and Russo "derived no benefit from any of the monies paid by the plaintiffs as alleged in the complaint, had no control over the conduct of the counterclaim defendants and are being sued solely because BK Group, LLC and Brian Kieper wrongfully held themselves out to be representatives of the BBK Group, Inc."

Default was subsequently entered against Kieper, BK and BBK. Default judgment in the amount of $57,066 and attorneys' fees and costs in the amount of $15,869.99 was entered against all defendants except Russo, who filed a motion for summary judgment.

In support of his motion for summary judgment, Russo submitted a certification that included the following assertions: He formed a corporation, BBK Group, Inc., for the purpose of providing Kieper, his brother-in-law at the time, with funds and the ability to operate a snowplowing business. His understanding with Kieper was that Kieper would run the

operations and finances of the business; Russo would be reimbursed for expenses he advanced and would have a contractual right to ten percent of the gross revenues from snowplowing. Russo received some reimbursement of his expenses, the last of which occurred "long before" the transactions that were the subject of this lawsuit. Kieper must have used BBK stationery to estimate the job for plaintiffs and then began using BK stationery. Russo had no knowledge of BK's formation or ownership and stated it appeared that any money received from plaintiffs were deposited into accounts over which he had no control. Russo also produced a certification from Kieper, who corroborated his description of events.

Plaintiffs contend that, despite Russo's assertion that he had nothing to do with the operations or finances of BBK, and that BBK was not authorized to engage in the business of home improvements, a home improvement license was issued by the State of New Jersey that identifies Russo as the principal of BBK. Plaintiffs identify deposit slips and checks with Russo's name on them, dated in March and April 2010. Consistent with Russo's certification, each of these checks were written no later than three months before plaintiffs received an estimate from BBK.

Plaintiffs filed a cross-motion for summary judgment.[2] In response to Russo's statement of material facts, plaintiffs admitted they had never met or spoken with Russo and stated they lacked sufficient information to admit or deny the lion's share of the remaining statements of fact.

At oral argument on the motions, plaintiffs maintained that BBK committed regulatory violations that rendered it liable under the CFA. Plaintiffs' counsel acknowledged that Russo did not participate in the violations and that he had no evidence Russo was aware of these violations. When the court described Russo as a passive shareholder, counsel agreed that Russo "never did anything." Nonetheless, he argued that Russo should be liable based on the corporation's violations because the corporation was a small corporation that Russo incorporated, he was the principal, the director, and "he was the corporation."

In this appeal, plaintiffs argue that summary judgment should not have been granted because a material issue of fact exists as to "whether Mr. Russo knew, or should have known, of the activities of Mr. Kieper." In reviewing the summary judgment decision here, we view the evidence "in the light most favorable to the non-moving party," and determine "if there is a

[2] Plaintiffs' cross-motion was denied. They have not appealed from that order.

genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). Therefore, the issue here is whether the evidence and all legitimate inferences to be drawn therefrom requires submission of Russo's personal liability under the CFA to the jury.

Generally, these "fundamental propositions" apply when a plaintiff seeks to impose personal liability upon a principal in a corporation:

> [A] corporation is a separate entity from its shareholders, and . . . a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise. "[E]xcept in cases of fraud, injustice, or the like, courts will not pierce a corporate veil." The limitations placed on a claimant's ability to reach behind a corporate structure are intentional, as "[t]he purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law[.]" Hence, to invoke that form of relief, the 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.
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> [Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472-73 (2008) (internal citations omitted).]

The inquiry here is altered to a degree by the fact that plaintiffs seek to impose personal liability upon Russo for alleged violations of the CFA. In Allen v. V & A Bros., 208 N.J. 114 (2011), the Court observed, "there can be no doubt that the CFA broadly contemplates imposition of individual liability." Id. at 130.

The CFA seeks to protect consumers from three categories of unlawful practices: affirmative acts, knowing omissions, and violations of regulations promulgated pursuant to the statute. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556 (2009). When the unlawful practice alleged is an affirmative act of misrepresentation, "individuals may be independently liable for violations of the CFA, notwithstanding the fact that they were acting through a corporation at the time." Allen, supra, 208 N.J. at 131. However, the Court also noted that, in each of the cases involving affirmative misrepresentations, "the individuals were not liable merely because of the act of the corporate entity and no court suggested that they could be. Instead, in

each of these circumstances, courts focused on the acts of the individual employee or corporate officer to determine whether the specific individual had engaged in conduct prohibited by the CFA." Id. at 132.

In Allen, the Court then turned to the question whether, and on what terms, an employee or corporate officer may be independently liable when the CFA claim is based upon a regulatory violation. Id. at 133. Because strict liability applies to such violations, the Court recognized that "notions of fairness" are implicated by imposing individual liability on corporate officers and employees. Ibid. Both the specific regulations upon which the complaint is based and the conduct of the individual defendant are pertinent to this analysis. Id. at 134.

Although recognizing a distinction can be drawn between principals and employees of a corporation, the Court based that distinction upon the status of the principals as "the ones who set the policies" and whose liability will be based on their "adopt[ing] a course of conduct" that violates a regulation. Ibid. The Court analogized the basis for the imposition of independent liability within the CFA context to the "tort participation theory" discussed in Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002):

> [T]he 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. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.
>
> [Id. at 303.]

The Court concluded, "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." Allen, supra, 208 N.J. at 136.

The violations alleged here arise out of the failure to secure a written contract, deficiencies or alleged misrepresentations in disclosures and other acts, none of which were personally committed by Russo. Plaintiffs admit they had no contact with Russo and that he personally did not violate any regulation. They neither allege nor have produced any facts that demonstrate that Russo was engaged in setting the policies of BBK or adopting a course of conduct for the corporation that violated any of the regulations. To the contrary, they contend that liability should be imposed because he "knew or should have known" about such violations. But Russo's assertions that he

played no role in the running of BBK were corroborated by Kieper and unrefuted by plaintiffs. To impose independent liability upon him based on this record would offend notions of fairness in much the same way as if liability were imposed upon an employee who neither set policy nor acted contrary to policy in violating a regulation.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION