



## **I. PRELIMINARY STATEMENT**

Defendants, Michael Favor III (“Favor”) and William McGoey (“McGoey”) (collectively “Individual Defendants”), filed an *in limine* motion asking the court to bifurcate trial in this matter between damages and liability pursuant to R. 4:38-2(b). Defendants Robert Kelley (hereinafter “Kelley”) and Joseph Cordova (hereinafter “Cordova”) joined this motion in support. Individual Defendants argue that if trial is not bifurcated, confusion among the jury may result in asking them to make findings as to liability on numerous distinct claims and theories against multiple defendants, including some defendants that have bankruptcy stays, leaving “empty-chairs” at trial. They also argue that reference to annual earnings from Evesham Mortgage, LLC would be prejudicial pursuant to N.J.R.E. 401, N.J.R.E. 402, and N.J.R.E. 403. Individual Defendants also filed an *in limine* motion to bar reference to Favor and McGoey’s annual earnings during the liability phase of trial.

Plaintiff, Landcor Holdings, L.P. (hereinafter “Landcor”), opposes both motions and claims a bifurcated trial would prejudice the Plaintiff and confuse the jury. Plaintiff further contends that bifurcation would lead to a duplication of time, costs, and efforts. Plaintiff asserts that amounts received by Individual Defendants are directly relevant to the matter.

For the reasons set forth herein, the Court hereby **DENIES** the Motion to Bifurcate and **GRANTS, in part**, the Motion to Bar Reference to Annual Earnings.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

This matter arises from a corporate relationship where Plaintiff alleges the Defendants violated provisions of the New Jersey Revised Uniform Limited Liability Company Act (hereinafter the “RULLCA”). Specifically, Plaintiff claims minority member oppression, breach of contract, promissory estoppel, breach of the implied covenant of good faith and fair dealing,

breach of fiduciary duty, fraud, conversion, improper distributions, fraudulent inducement, default of a promissory note, and further seeks to have the Court impose a constructive trust and require an accounting of all financial information for Evesham Mortgage, LLC (hereinafter “Evesham”).

Plaintiff’s allegations arise from a business relationship between the Plaintiff and Evesham wherein the Plaintiff became a 5% owner of Evesham. The parties allegedly consummated a “Profit Sharing Agreement” which went into effect on March 1, 2012, which stated that Landcor “will receive profit on each closed loan in the amount of 10 Basis Points...” (Pl. Exhibit 15). According to the Agreement, basis points were to be calculated by multiplying the total closed loan volume by 0.10%. The Agreement states that “[t]his agreement will be in effect as long as Landcor Holdings, LP holds ownership in Evesham Mortgage, LLC.” *Id.* Plaintiff contends that it did not receive commission payments pursuant to the Profit-Sharing Agreement and that Defendants instead improperly paid themselves several million dollars over several years.

Defendants contend that the Profit-Sharing Agreement and Evesham’s Operating Agreement were both modified by subsequent oral agreements between Landcor’s owner, Joseph Samost, and Defendant Brown. Defendants also assert that the Individual Defendants were not involved in the management of Evesham and assert that they are shielded by the corporate veil such that any of the Plaintiff’s claims against the Individual Defendants must be dismissed.

Defendant Evesham entered into a consent judgment with Plaintiff shortly after Evesham filed for bankruptcy and the claims as to Defendant Brown have been dismissed without prejudice pending the outcome of Bown’s bankruptcy proceeding.

Individual Defendants filed the instant Motion *in limine* to Bifurcate Liability and Damages at Trial, to which the Plaintiff filed an opposition. Defendants Kelley and Cordova joined in the motion. Individual Defendants filed a subsequent Motion *in Limine* to Bar Reference to Annual

Earnings Received from Evesham Mortgage, LLC. Again, Plaintiff opposed; however, Defendants Kelley and Cordova did not join on this motion.

Trial is scheduled for October 14, 2024.

### **III. ARGUMENTS**

#### **A. Motion in Limine- Bifurcate Trial into Liability and Damages**

Individual Defendants argue that liability and damages should be bifurcated and tried separately Pursuant to R. 4:38-2(b). They posit that Plaintiff must first establish liability that would justify piercing the corporate veil or otherwise establish individual liability. They rely on Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 345 (1994), where the Supreme Court found circumstances favoring bifurcation.

Moving Defendants further argue that bifurcation is necessary to avoid prejudice to them and confusion by the factfinder as this is a complex multi-party case with multiple defendants allegedly liable under a multitude of different legal theories. (Def. Br. 3). They note that Plaintiff never sought any type of discovery from Defendants Favor or McGoey. (Def. Br. 3). They claim that Plaintiff has not presented any documentary or testimonial evidence that (a) could justify piercing of Evesham's corporate veil, or (b) could provide a basis for stand-alone claims against the Individual Defendants. (Def. Br. 3). Moreover, if evidence were to be presented at trial against them, it would be complex, it would amount to "discovery at trial," and it would require proofs and testimony separate from that offered against Brown and Evesham. (Def. Br. 3).

Individual Defendants assert that the amount of damage attributable to each individually named defendant will almost certainly vary (e.g., given the claims for improper distribution and conversion). (Def. Br. 4). They highlight how Plaintiff supplied the Court with evidence that Defendant Richard Brown was in "total control" of Evesham's finances and they emphasize that

Plaintiff must establish which operating agreement applies between the parties and thereafter establish the alleged conduct that breached any duty owed by Individual Defendants under that operating agreement. (Def. Reply 3). To allow Plaintiff to proceed without first establishing the Individual Defendants' knowledge and applicability of the alleged Profit-Sharing Agreement would be prejudicial. (Def. Reply 3).

Plaintiff argues that trial bifurcation would create complexity and confusion for the jury and would increase the time for and costs of trial because the issues of liability and damages are intertwined. (Pl. Opp. 1). Plaintiff notes that the Court previously rejected Individual Defendants' assertions that there is no evidence to support piercing the corporate veil and/or the claims against the Individual Defendants. (Pl. Opp. 2).

According to Plaintiff, the threshold issue is whether the liability and damages issues are intertwined and a jury cannot determine whether the Defendants are liable for violating the minority oppression provisions of the Revised Uniform Limited Liability Company Act ("RULLCA") without knowing the specific amounts of money at issue. (Pl. Opp. 2-3). Plaintiff claims it is not possible to separate liability from damages. (Pl. Opp. 3).

Contrary to the Moving Defendants, Plaintiff asserts that there are no "missing" parties as Evesham Mortgage, while involved in bankruptcy proceedings, consented to entry of judgment in favor of Landcor and the bankruptcy trustee will appear and testify, if necessary. (Pl. Opp. 4). Plaintiff argues that all claims that Individual Defendants allege to be derivative claims are claims that have been asserted by Landcor and can be asserted by Landcor under the terms of the Consent Order. (Pl. Opp. 4). See Exhibit A.

Defendants Kelley and Cordova agree to bifurcation for liability and damages but only as to all Defendants. (Def. Opp. 3). They argue that the relevant proofs on liability and damages are

intermingled such that bifurcation of less than all parties may become prejudicial to the party defending against the lawsuit. (Def. Opp. 2). They contend that if the jury were to determine only one class of defendants and then hear repetitive evidence on the second set of defendants, this would cause confusion and misinterpretation of the evidence. (Def. Opp. 2). They urge that a single bifurcation and a single trial would be most efficient and least prejudicial to all defendants. (Def. Opp. 3).

**B. Motion in Limine- Bar Reference to Individual Defendants' Annual Earnings**

Individual Defendants seek to bar any reference to Favor and McGoey's annual earnings during the liability phase of trial pursuant to N.J.R.E. 401, N.J.R.E. 402, and N.J.R.E. 403. (Def. Br. 1). They believe Plaintiff will engage in hyperbolic language in the presence of the jury regarding Individual Defendants' perceived wealth, material possessions, and annual earnings given prior references such as Defendant Favor owning a white Corvette. Movants argue that these references are improper and prejudicial and they seek to avoid having to object during opening statements or during testimony. (Def. Br. 1-2).

Plaintiff argues that all of the claims against Individual Defendants rest on the assertion that upon receipt of the Complaint, Individual Defendants (acting in concert with the remaining defendants) vastly increased payments and perks to themselves, while paying nothing to Landcor. (Pl. Opp. 1). For example, Individual Defendants received \$540,000 in guaranteed payments in 2019 and received in excess of \$2.5 million in 2020. (Pl. Opp. 1). Plaintiff claims the payments and perks increased in 2021 and yet Landcor was paid nothing. (Pl. Opp. 2).

Plaintiff further asserts that Individual Defendants are improperly attempting to litigate their Motion for Reconsideration, already denied by the Court, and they once again seek dispositive relief. (Pl. Opp. 3). This Court previously ruled that Count I RULLCA, minority

oppression claims would proceed to trial and, according to Plaintiff, the amounts of payment for the minority oppression is tied directly to the amounts at issue; thus, critical to the jury's consideration at trial. (Pl. Opp. 3). Plaintiff argues that the claims for breach of fiduciary duty and violation of the covenant of good faith and fair dealing involve the amounts of money at issue and both claims are directly relevant to liability and damages. (Pl. Opp. 4).

Next, Plaintiff argues that the amounts received by Individual Defendants are directly relevant to and absolutely necessary for an insolvency analysis. (Pl. Opp. 4). Plaintiff asserts that more than \$10 million taken by the defendants rendered Evesham insolvent, giving rise to liability under N.J.S.A. 42:2C-36, 67(a). (Pl. Opp. 4).

Lastly, Plaintiff argues that Individual Defendants do not point to any "undue prejudice" under N.J.R.E. 403 that could arise from presenting the jury with facts relating to the significant money received by Individual Defendants from Evesham. (Pl. Opp. 5).

#### **IV. LEGAL STANDARD**

For the convenience of the parties or to avoid prejudice, the court may order a separate trial of any claim, cross-claim, counterclaim, third-party claim, or separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. N.J. Ct. R. 4:38-2(a). Pursuant to R. 4:38-2(b),

Whenever multiple parties, issues or claims are presented in individual or consolidated actions and the nature of the action or actions is such that a trial of all issues as to liability and damages may be complex and confusing, or whenever the court finds that a substantial saving of time would result from trial of the issue of liability in the first instance, the court may on a party's or its own motion, direct that the issues of liability and damages be separately tried. Except in extraordinary circumstances, the issue of liability shall be tried first and if the order of bifurcation otherwise directs, the reasons therefor shall be explicitly stated therein.

Additionally, Supreme Court Directive #3-77, issued October 17, 1977, states:

The Supreme Court desires that pursuant to *Rule 4:38-2(b)*, which provides for permissive and not mandatory bifurcation, the issue of liability may be tried separately and judges are encouraged to utilize the rule and try the issue of liability first in cases where they feel it may expedite the disposition of the case.

See Diodato v. Rogers, 321 N.J. Super. 326, 333-34 (Law Div. 1998).

Separate trials are appropriately ordered to avoid prejudice or where a single trial might be anticipated to be unduly complex or confusing. Eschle v. E. Freight Ways, Inc., 128 N.J. Super. 299 (Law Div. 1974); Fuschetti v. Bierman, 128, N.J. Super. 290 (Law Div. 1974); Barbaria v. Sayreville, 191 N.J. Super. 395 (App. Div. 1983). The decision whether to bifurcate a trial is vested in the sound discretion of the trial court. Thomspon v. Merrell Dow Pharms., Inc., 229 N.J. Super. 230, 255 (App. Div. 1988). The Appellate Division will not disturb the lower court's decision absent an abuse of discretion. Id.

Pursuant to N.J.R.E 403: Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of:

- (a) Undue prejudice, confusion of issues, or misleading the jury; or
- (b) Undue delay, waste of time, or needless presentation of cumulative evidence.

## V. ANALYSIS

The New Jersey Supreme Court discussed the fairness of bifurcation and the factors that influence that exercise of discretion in Tobia v. Cooper Hosp. Univ. Med. Ctr., 136 N.J. 335, 345 (1994), where the plaintiff brought a medical malpractice claim for the injuries she sustained when she fell off a stretcher in a hospital. The Court stated:

Rule 4:38-2 reposes discretion in a court to order that liability and damages be tried separately when a trial of all issues may be "complex and confusing," or the bifurcation may yield a "substantial saving of time." In exercising that discretion, a court should consider the fairness to the litigant when the issues of damages and liability



may be indivisible. In other words, if all or most of a claimant's damages are due to one of several incidents, a jury may not be able to evaluate the relative liabilities in a vacuum without knowing the nature and extent of the injuries incurred. "Extraordinary circumstances" may call for a single trial.

Id. (citing Powell v. Gen.Motors Corp., 107 N.J. Super. 29, 33 (App. Div. 1969) (referring to exception to earlier administrative directive calling for bifurcation in cases in which three or more parties contest liability)).

In considering all the arguments, the Court denies the Motion *in limine* to bifurcate. The issue at the crux of this case relates to the alleged withholding of distributions to Plaintiff. While withheld distributions certainly play a role in assessing damages, the concept of finances and distributions made or withheld and whether those payments were diverted to other members or employees of Evesham Mortgage is crucial to the issue of liability. The Court makes this determination while acknowledging Defendants' argument that damages are capped based on Plaintiff's table of damages as well as Defendants' argument that Plaintiff lacks sufficient expert evidence relating to damages. Nonetheless, there is commonality in the facts and evidence relating to both liability and damages. Because the evidence relating to distributions made or withheld is so intertwined between liability and damages, it would be a duplication of resources to bifurcate the trial.

The Court further finds that the issues are not so complex so as to cause confusion of the jury. As to piercing the corporate veil and matters relating to corporate membership, evidence should first be presented to the jury laying the groundwork on these topics and then Plaintiff can proceed to address damages in one cohesive trial rather than through duplicative bifurcation. As to jury deliberations, with a proper verdict sheet, the jury will first address liability including the piercing of the corporate veil and corporate membership and will then move on to subsequent

questions regarding damages. The Court does not find the evidence or this sequence of presentation too complex that the jury would not be able to handle it, especially given that liability and damages are so intertwined.

Additionally, the Court cannot find that evidence relating to profits and profit distribution would be prejudicial to the Individual Defendants. In fact, this is the very heart of the matter for the jury to consider. Further, although Moving Defendants argue that it would be prejudicial to allow Plaintiff to proceed without first establishing the Individual Defendants' knowledge and applicability of the alleged Profit-Sharing Agreement, especially where Plaintiff supplied the Court with evidence that Defendant Richard Brown was in "total control" of Evesham's finances, the Court cannot agree. The Court notes there is also testimony of Brown indicating that the Individual Defendants had an equal say in the business and that they regularly discussed Evesham's financial information. (Pl. Opp. 2). Thus, it is clear that there are questions relating to the company's finances and control thereof relating to both liability and damages. As such, the matter must proceed to the jury in a single trial.

Finally, the Court does not find that bifurcating the trial would be a "substantial saving of time." Tobia, 136 N.J. at 345 (1994). To the contrary, bifurcation here would duplicate resources and time given the intertwining of liability and damages.

Regarding the Motion *in Limine* to Bar Reference of Individual Defendants' Annual Earnings Received from Evesham Mortgage, LLC, the Court grants the Motion to the extent that Plaintiff shall be limited to presenting evidence of income in concrete terms and numbers from Evesham Mortgage and shall refrain from utilizing hyperbolic language to discuss defendants' wealth. The Plaintiff is not permitted to reference Defendants' real property, personal property, or material possessions as there is no record evidence to suggest that same is relevant. The Court

finds that the evidence must be limited to concrete, financial proofs as reference to anything else would be more prejudicial than probative under the balancing test of N.J.R.E. 403.

**VI. CONCLUSION**

For the foregoing reasons, the Court **DENIES** the Individual Defendants' Motion *in limine* to Bifurcate the Trial into Liability and Damages and **GRANTS, in part**, the Individual Defendants' Motion *in limine* to Bar Reference to Income Received from Evesham Mortgage, LLC.