

NJ's High Court Adopts Rule Permitting Personal Liability under the Consumer Fraud Act on Officers, Managers, Owners and/or Employees of Construction Firms for Statutory Violations

**By Kevin J. O'Connor, Esq.
Peckar & Abramson, P.C.***

In Allen v. V & A Brothers, Inc., 2011 N.J. Lexis 697 (July 7, 2011), New Jersey's Supreme Court issued a ruling in a hotly contested case on the issue of whether officers, owners, managers and/or employees of businesses providing services to consumers can be sued individually (alongside the company) and be held personally accountable for statutory violations under New Jersey's Consumer Fraud Act, N.J.S.A. § 56:8-1 et seq. ("CFA"). In the context of that residential construction case, the Court held that they may, and adopted a fact-specific test for liability that will render it difficult for such defendants to extricate themselves from a case with a pre-trial motion, should they find themselves named in a lawsuit.

The CFA was originally enacted by the New Jersey Legislature over 50 years ago to respond to the public harm resulting from "the deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods." The entire thrust of the CFA has historically "pointed to products and services sold to consumers in the popular sense." Neveroski v. Blair, 141 N.J. Super. 365, 378 (App. Div. 1976). Since its enactment over 50 years ago, the Legislature and the courts have greatly expanded the scope of the CFA to apply in the broad sense to all sorts of circumstances in the construction field.

In addition to fraudulent misrepresentations and omissions of material fact, in the field of residential construction, the CFA and implementing regulations can result in liability for myriad statutory violations that have the practical result of imposing strict liability on companies and their individual owners, officers, managers and/or employees. Allen v. V & A Bros., Inc., 414 N.J. Super. 152 (App. Div. 2010).

The Allen case shows that litigating claims of construction defects on residential projects can lead to personal liability against construction company owners, managers and/or employees, which should give any contractor cause to reflect on whether to even sue on that unpaid contract balance. In that case, the Appellate Division had reversed the dismissal of CFA claims against principal officers and an employee of a construction company, and articulated that all that is needed to impose personal liability on officers is some proof of their knowledge or "personal participation" in the regulatory violation. There, homeowners had brought claims against a landscaping company and its individual owners and an employee for property damage that resulted from a defective retaining wall constructed on their property. The homeowners claimed that the wall was poorly constructed and that inferior backfill was used, in breach of the contract. The homeowners raised statutory violations against the construction company and its owners, including: a) that there was no written contract in violation of N.J.A.C. § 13:45A-16.2(a)(12); b) that defendants substituted substandard materials in their completion of

the project; and c) that defendants accepted final payment without permission from the homeowners even though the construction plans had been changed, in violation of N.J.A.C. § 13:45A-16.2(a)(10(ii), and before there was final approval by the local municipality. The lower court had dismissed the individual owners and their employee from the case and the homeowners went on to obtain a total damage award of \$490,000 once the damages were trebled.

On appeal, the Appellate Division ruled that the principals of the company and their employee were presumed to be familiar with the applicable regulations and that plaintiffs need not prove intent for those individual defendants to be liable. Allen, 414 N.J. Super. at *12. The Supreme Court has agreed, and has adopted a fact-specific test for imposing personal liability on owners/officers/managers/employees of a corporate defendant. Making matters worse for such targets, the Court specifically ruled that “[t]hese necessarily fact-sensitive determinations often will not lend themselves to adjudication on a record presented in the form of a summary judgment motion.” 2011 N.J. Lexis 697, * 10.

This recent opinion provides further proof that construction firms performing services in the residential context must take care to ensure strict compliance with the statutes and regulations application in residential construction. The recent case law has developed to, in essence, substantially lessen the burden of proof on the plaintiff seeking to impose personal liability, thereby rendering the corporate shield of questionable utility to shield owners/officers/employees from personal liability. Two bills are now pending in the New Jersey Legislature to reverse the pendulum and strictly limit the relief available to litigants in this context. Assembly Bill A1064 has passed in the Assembly and has been referred to the Senate Commerce Committee. Assembly Bill A3333 was introduced on October 7, 2010 and would, if adopted in current form, drastically limit the relief available in the construction context under the CFA. In the interim, however, construction firms are well advised to closely evaluate the manner in which they perform contracts and take action to ensure uniform procedures which strictly adhere to applicable regulations.

*This blog is maintained by Kevin J. O'Connor, Esq. The views expressed herein are those of the author and not necessarily those of the law firm Peckar & Abramson, PC.