

Real Estate Title Insurance & Construction Law

Individual Liability in Construction Litigation

The corporate form is not an unassailable defense

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Individuals conducting business in the construction industry typically will do so through a corporation or some other business entity to obtain the legal advantages available to such entities. As a general matter, “[t]he rule of law that has evolved in New Jersey is that the corporate form as a wholly distinct and separate entity will be upheld.” *Coppa v. Taxation Div. Director*, 8 N.J. Tax 236, 246 (Tax Ct. 1986). As such, “a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise.” *State Dep’t of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 500 (1983).

Both decisional and statutory law, however, have chipped away at the protection provided by the corporate form to the point where individuals can be exposed to significant personal liability

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in construction disputes even though the work on a construction project was performed by a business entity. These exceptions include: (1) traditional piercing the corporate veil liability; (2) where the law imposes an independent duty on the individual; (3) statutory claims pursuant to the Consumer Fraud Act (CFA), N.J.S.A. § 56:2-1, et seq. and/or the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. § 45:22A-37; and (4) the tort participation theory. When applied, these exceptions can effectively undermine the assertion of the corporate form as a defense and expose individuals to potentially significant personal liability in construction disputes.

Piercing the corporate veil is an equitable doctrine that provides redress for an underlying wrong in circumstances where recovery is not otherwise possible because the primary defendant is a business entity without assets to pay a judgment. See *Verni v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 199 (App. Div. 2006). Although a variety of factors, including failure to observe corporate form, undercapitalization and commingling or misuse of corporate funds may inform the analy-

sis, the central “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.” *Ventron*, 94 N.J. at 500.

The recent decision in *Aacon Constr. v. Poppe*, 2012 N.J. Super. Unpub. LEXIS 1818 (App. Div. July 30, 2012), illustrates the risks that individuals involved in the construction industry can create for themselves when they fail to take appropriate steps to properly observe the corporate form. There, Glenn Poppe had a number of business entities that he used in connection with the construction of a Walgreens store. One entity served as the general contractor, one entity entered into a subcontract with the plaintiff (but represented that it was the general contractor), and a third entity issued checks to the plaintiff on the project. Ultimately, the plaintiff sued all of the business entities and the individual. In affirming judgment in favor of the plaintiff, holding Poppe jointly and severally liable with his companies, the Appellate Division noted that the three business entities “were exclusively controlled by Glen Poppe, who used the entities to avoid paying [plaintiff].”

Individuals in the construction indus-

try should undertake efforts to ensure that the corporate form is observed generally and in connection with specific construction projects. Although cash flow is often an issue on projects, it is imperative that parties endeavor to avoid commingling of funds between various corporate entities and the individual. Similarly, to the extent there are related companies involved on the project, each company should have a defined role, and that role should be explained to other parties on the project to avoid subsequent claims of misconduct.

The corporate form can be also disregarded, and individuals made personally liable for negligence claims, if the individual owes the plaintiff an independent duty imposed by law. See *Saltiel v. GSI Consultants*, 170 N.J. 297 (2002). As the New Jersey Supreme Court stated in *Levine v. Wiss & Co.*, 97 N.J. 242, 246 (1984) (citation omitted): “One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession in good standing in similar communities.”

The Appellate Division recently applied this principal in *First American Title Ins. Co. v. Semester Consultants*, 2012 N.J. Super. Unpub. LEXIS 689 (App. Div. Mar. 29, 2012). There, the plaintiff title company entered into a contract with a company, which was engaged in the business of providing professional engineering and land surveying services, to prepare site plans and surveys for property it owned and in connection with submitting permits to the New Jersey Department of Environmental Protection. The plans provided to the plaintiff contained a number of errors that prevented it from being used as part of the plaintiff’s ongoing permit application. The plaintiff sued the company for breach of contract and also asserted tort claims against the company’s president and owner, who was a licensed professional engineer and who had prepared the plans on behalf of the company. The trial court dismissed the claim against the individual, noting that he could not be personally liable for any claim because he had incorporated his business. The Appellate Division disagreed, ruling: “There was simply no need to pierce the corporate veil As a licensed professional engineer, [the individual] clearly owed [] a duty to plain-

tiff and he could be found liable for his individual negligence whether or not the corporate veil was pierced.” As the *First American* decision demonstrates, design professions in particular may be susceptible to claims that they are personally liable for the work that they perform on behalf of their business entity on construction projects.

The corporate form can also be disregarded in claims under certain statutes containing provisions that create a de facto veil-piercing cause of action. For example, in *Allen v. V & A Bros.*, 208 N.J. 114, 131, 133-34 (2011), the court held that, based on the CFA’s expansive definition of “person” and broad, remedial purpose, any corporate officer or employee who commits an affirmative act or knowing omission that violates the CFA, or is responsible for a violation of regulations enacted pursuant to the CFA, can be held individually liable, even if it is only the business entity that contracted with the plaintiff consumer. Similarly, the PREDFDA statute expressly provides that “every general partner, officer, or director of a developer, and every person occupying a similar status or performing a similar function, shall also be liable jointly and severally with and to the same extent as such developer” for violations of certain registration requirements and/or for making untruthful statements or omissions of material facts in connection with planned developments. N.J.S.A. § 45:22A-37.

In light of the specific regulations enacted pursuant to the CFA that apply to the construction industry (e.g., Home Improvement Practices regulations, N.J.A.C. § 13:45A-16, et seq., Home Improvement Contractor Registration, N.J.A.C. § 13:45A-17, et seq.), the application of the CFA to residential construction, see, e.g., *New Mea Constr. Corp. v. Harper*, 203 N.J. Super. 486 (App. Div. 1985), and the prevalent use of planned residential communities in New Jersey, the CFA and the PREDFDA statute are powerful tools that can be used by plaintiffs to circumvent the corporate form and target a corporation’s (or other business entity’s) principal(s) or owner(s). Additionally, because these statutes expose defendants to damages multipliers (treble damages for CFA liability, N.J.S.A. § 56:2-19, and double damages for PREDFDA liability,

N.J.S.A. § 45:22A-37), efforts by plaintiffs to use these statutes as a sword to pierce the corporate shield pose significant risks to individuals involved in the construction industry, particularly those that are involved in residential and planned community construction and development.

Under the tort participation theory, “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” even though his or her acts were performed for the benefit of the corporation and without any personal benefit for the individual. *Saltiel*, 170 N.J. at 303. For example, in *Reliance Ins. Co. v. The Lott Group*, 370 N.J. Super. 563, 579-82 (App. Div. 2004), the Appellate Division affirmed a judgment against the individual owner of a consulting business that aided a general contractor in diverting project funds that were protected by the Trust Fund Act, N.J.S.A. § 2A:44-148, into accounts that were used to satisfy the general contractor’s debts. As the court stated, “[t]he acts of an individual corporate officer, whether for personal gain or not, which operate to subvert the protective purposes of the Act cannot be shielded by the artifice of his use of a corporation to achieve the diversion.”

Because the tort participation theory arises only where the business entity is also liable in tort, it is not likely to be implicated in a large number of construction disputes where claims typically arise out of contractual relationships. Nevertheless, it provides a potential alternative for plaintiffs to invoke to evade the protections of the corporate form.

Individuals involved in the construction industry will typically conduct business through a variety of business entities. When disputes arise on the project, plaintiffs may in certain circumstances seek to hold individuals personally liable regardless of the fact that the individual’s business entity performed the work on the project. While individuals should invoke the corporate form as a defense in such circumstances, this defense is not unassailable. Parties and practitioners should be cognizant of and take steps to avoid the application of the variety of mechanisms that plaintiffs and courts can utilize to disregard the corporate form and impose personal liability. ■