

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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June 23, 2015

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RE: **Sens Mechanical, Inc, Plaintiff, v. Dewey Beach Enterprises, Inc.
ET AL., Defendants**
C.A. No.: S13L-12-027 RFS

Dear Counsel,

Before the Court is the Motion for Summary Judgment of Third-Party Defendant Stephen Pope (“Pope”) against Third-Party Plaintiff Daystar Sills, Inc. (“Daystar”).

Facts

This is a fraud case with liability in dispute.¹ Pope is an authorized representative of Sens Mechanical, Inc. (“Sens”), a company hired by Daystar.² On October 8, 2013 Pope executed a Partial Release of Liens for Application and Certificate for Payment in which he warranted:

...that all laborers and subcontractors employed by it, all suppliers or materialmen from which it has acquired materials incorporated into the Project and any lien or bond claimant relating to the undersigned’s work have been paid in full and that none of such laborers, subcontractors, suppliers, materialmen, or claimant has any claim, demand or lien against the Premises through the 31st day of August, 2013.³

By executing the partial release, Pope certified that Sens had paid for all labor, materials and equipment through August 31, 2013.⁴ Relying on this certification, Daystar paid an application and certificate for payment to Sens.⁵ After payment, Sens certified all line items related to any equipment or other materials purchased from Critical Systems, LLC (“Critical Systems”), a vendor used by Sens, were paid in full.⁶

¹ See generally, Reply Brief in Supp. Of Mot. for Summ. J. (seeking entry of an order for summary judgment based on the absence of personal liability).

² Def.’s Answer to Third-Party Def.’s Mot. for Summ. J at ¶ 1.

³ Defs.’ Am. Answer to Statement of Claim and Compl. for Mechanic’s Lien, Affirmative Defenses, Aff. Of Defense, Countercl. and Third-Party Compl. at ¶ 72.

⁴ Def.’s Answer to Third-Party Def.’s Mot. for Summ. J at ¶ 1.

⁵ *Id.*

⁶ *Id.*

On February 11, 2014, Daystar's President, David Sills ("Sills"), was contacted by Critical Systems regarding HVAC equipment it sold to Sens.⁷ Critical Systems informed Sills that Sens owed Critical Systems more than \$200,000 for equipment it provided for the project.⁸ Also, Critical Systems notified Sills this matter was being referring to an attorney.⁹

Daystar alleges Pope knowingly signed certifications under oath stating falsely that subcontractors had been paid in full and there were no outstanding claims against this project.¹⁰ Daystar further contends the continued payments were made to Sens in reliance on Pope's false certifications.¹¹ As a result, Daystar has alleged Pope is personally liable for fraud based on his personal participation.¹²

Pope, in turn, argues when executing the certifications he was acting as an agent of Sens.¹³ Also, Pope claims he lacked knowledge as to whether the information he attested to was false.¹⁴ Pope, as Vice President, was an authorized signatory for Sens when the certifications were executed.¹⁵ Pope asserts his position as Vice President in itself did not make him privy to payment records or

⁷ *Id.*

⁸ Defs.' Am. Answer to Statement of Claim and Compl. for Mechanic's Lien, Affirmative Defenses, Aff. Of Defense, Countercl. and Third-Party Compl. at ¶ 72.

⁹ *Id.* at ¶ 74.

¹⁰ Def.'s Answer to Third-Party Def.'s Mot. for Summ. J at ¶ 1.

¹¹ *Id.*

¹² *Id.* at 6–8.

¹³ Reply Brief in Supp. Of Mot. for Summ. J. at ¶ 4–7.

¹⁴ *Id.* at ¶ 7–8.

¹⁵ *Id.* at ¶ 4–7.

invoices involving the project.¹⁶ Pope denies individual liability, contending the representations in the certification were made in his capacity as an authorized agent of Sens.¹⁷ Based on agency principles and Pope's lack of knowledge of the falsity of the statements contained in the certification, Pope claims he did not commit fraud and cannot be held personally liable.¹⁸

Procedural Background

This fraud action arises from an underlying contract dispute involving Sens. Sens filed a claim for a Mechanic's Lien on Hyatt Place, ("Property")¹⁹ in the Delaware Superior Court on December 18, 2013. One of the parties named as a defendant by Sens is Daystar.²⁰ Daystar, in response, filed a Petition to Discharge the Mechanic's Lien in the amount of \$121,900.14 and agreed to secure an irrevocable letter of credit on February 7, 2014.²¹ Also, Daystar asserted a breach of contract counterclaim against Sens for damages.²² Sens filed a response on February 20, 2014 disputing the proposed dollar amount, asserting if the amount of

¹⁶ *Id.* at ¶ 4–9.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 3–9.

¹⁹ Hyatt Place is a multi-story building located at the southwest corner of Coastal Highway and Dickinson Avenue in Dewey Beach, Delaware at 1301 Coastal Highway, Dewey Beach, Delaware 19971.

²⁰ *See generally*, Compl. (listing the defendants in this case).

²¹ Pet. To Discharge Mechanic's Lien at ¶ 2.

²² Defs.' Am. Answer to Statement of Claim and Compl. for Mechanic's Lien, Affirmative Defenses, Aff. Of Defense, Countercl. and Third-Party Compl. at ¶ 49–65.

the letter of credit was increased by \$14,010 to include, what it calculated to be, appropriate interest, Sens would not object to the Petition.²³

On February 25, 2014, Daystar filed a Third-Party Complaint against Pope alleging the following: (1) materially false applications and certifications of payment were knowingly signed and submitted by Pope; (2) the false representations were known by Pope prior to execution of the partial releases of liens; and (3) Pope knew or should have known that Daystar would rely on the certifications. Pope answered the Third-Party Complaint on April 15, 2014.²⁴ Pope then filed the Motion for Summary Judgment being considered presently on March 20, 2015.²⁵

Standard of Review

Summary judgment will be granted only if the moving party, who bears the initial burden, can establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.²⁶ The Court examines all of the evidence, and the reasonable inferences therefrom, in the light most favorable to the non-moving party.²⁷ Using this lens, only if the moving party

²³ Pl.'s Resp. to Pet. To Discharge Mechanic's Lien at ¶7.

²⁴ Defs.' Am. Answer to Statement of Claim and Compl. for Mechanic's Lien, Affirmative Defenses, Aff. Of Defense, Countercl. and Third-Party Compl. at ¶ 83–90.

²⁵ See generally, Reply Brief in Supp. Of Mot. for Summ.

²⁶ See, e.g., *Direct Capital Corp. v. Ultrafine Techs., Inc.*, 2012 WL 1409392, at *1 (Del. Super. Jan. 3, 2012) (citations omitted) (iterating the exacting standard of summary judgment).

²⁷ *Id.*

establishes that no factual questions indeed exist does the burden shift to the non-moving party to demonstrate the existence of such factual questions which must “go beyond the bare allegations of the complaint.”²⁸

Discussion

Pope seeks an order entering summary judgment dismissing all claims related to his personal liability.²⁹ Pope asserts Daystar failed to allege sufficient facts to support its claim of fraud against Pope.³⁰ Specifically, Pope claims he is immune to personal liability because he was acting as an agent.³¹ Also, Pope contends Daystar has failed to allege facts supporting the contention that Pope had knowledge of the falsity of the statements contained in the Applications and Certifications for payment.³² Alternatively, Daystar contends there are sufficient facts from which a reasonable fact finder could conclude that Pope did in fact have knowledge of the false representations.³³ Pope’s Motion for Summary Judgment is **DENIED** for the reasons stated herein.

²⁸ *Id.*

²⁹ *See generally*, Reply Brief in Supp. Of Mot. for Summ. J. (seeking entry of an order for summary judgment based on the absence of personal liability).

³⁰ *Id.*

³¹ *Id.* at ¶ 4–7.

³² *Id.* at ¶ 7–8.

³³ Def.’s Answer to Third-Party Def.’s Mot. for Summ. J at ¶ 1–7.

Fraud

To state a claim for fraud, a plaintiff must plead with particularity to the following elements: 1) a false representation of material fact; 2) the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; 3) the defendant's intent to induce the plaintiff to act or refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon that representation; and 5) damage to the plaintiff as a result of such reliance.³⁴ Superior Court Civil Rule 9(b) requires circumstances constituting fraud to be stated with particularity,³⁵ but knowledge may be pled generally.³⁶ When a plaintiff pleads a claim of fraud that charges that a defendant knew a specific fact, however, particular facts must be pled such that a reasonable fact finder could infer the defendant had knowledge of that fact.³⁷ In order to meet the particularity requirement, a complaint must allege: "1) the time, place and contents of the false representation; 2) the identity of the person making the representation; and 3) what the person intended to gain by making the representation."³⁸

³⁴ *Duffield Assocs., Inc. v. Meridian Architects & Eng'rs, LLC*, 2010 WL 2802409, at *4 (Del. Super. July 12, 2010).

³⁵ *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Abbot Labs. v. Owen*, 2014 WL 8407613, at *8 (Del. Super. Sept. 20, 2014).

*Under Delaware Law Agency Principles for Tortious Fraud and Contractually
Based Fraud Are Distinct*

Actions for fraud can be properly brought under contract law or tort law. Contractual claims and tortious claims are analyzed distinctly under Delaware law. “It is established law that an agent for a disclosed principal is not a party to a contract and is not liable for its nonperformance.”³⁹ Hence, the question to be considered when analyzing a contractually based fraud claim is whether defendant made promises or signed the contract personally or solely as an agent of his company.⁴⁰

Conversely, under Delaware tort law, corporate officials may be held individually liable for their fraudulent tortious conduct, even if undertaken while acting in their official capacity.⁴¹ An agent who performs tortious fraud is not excused from personal liability for his actions solely on account of acting on behalf of a principal.⁴² This concept is embodied with the well-established personal participation doctrine. According to the personal participation doctrine, a corporate official cannot shield himself behind a corporation when he is an actual participant in the tort.⁴³ Therefore, unlike a contractual fraud claim, the relevant

³⁹ *American Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1101, 1105 (Del. Super. 1982).

⁴⁰ *Spanish Tiles, Ltd. v. Hensey*, 2009 WL 86609, at *2 (Del. Super. Jan. 7, 2009).

⁴¹ *Duffield Assoc., Inc.*, 2010 WL 2802409, at *4.

⁴² *Ayers*, 2004 WL 1965866, at *3.

⁴³ *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978).

question when examining a tortious fraud claim is whether or not the defendant personally participated in the tortious conduct.⁴⁴

Personal participation doctrine can be triggered if an agent actively participates, consents, or ratifies a tortious scheme. In *JP Morgan Chase Bank v. Winnick*, the United States District Court for the Southern District of New York held officers and directors of corporations may be liable for fraud committed by that corporation if they participate in the fraud or have actual knowledge of it.⁴⁵ Moreover, the *Winnick* Court found high-ranking officers of a corporation may be presumed to have knowledge of both the fraud in question and the substantive terms of a signed statement.⁴⁶

Similarly, Delaware courts have held corporate officers and directors may be liable for their active participation in tortious conduct, even if they are acting in an official capacity for the corporation which they serve.⁴⁷ In *Spanish Tiles, Ltd. v. Hensey*, this Court found the personal participation doctrine attaches to corporate officers for torts in which they “commit, participate in, or inspire, even though they are performed in the name of the corporation.”⁴⁸

⁴⁴ *Id.*

⁴⁵ 350 F. Supp. 2d 393, 399 (S.D.N.Y. 2004).

⁴⁶ *Id.* at 400.

⁴⁷ *Ayers*, 2004 WL 1965866, at *2.

⁴⁸ 2009 WL 86609, at *3 (quoting *Brasby v. Morris*, 2007 WL 949485, at *8 (Del. Super. Mar. 29, 2007)).

Application

The dispute between Daystar and Pope represents only a piece of a much larger quarrel. If this case was exclusively under contract law, Pope may be entitled to an order granting summary judgment. To determine whether Pope is personally liable under contract law, the Court analyzes whether the promises or signed certifications were executed by Pope acting as an agent of his company or not.⁴⁹ Pope is an employee of Sens. As its agent, he was authorized to sign certifications for Sens, including those regarding the construction project at issue. Also, but for his duty as an agent for Sens, Pope would not have signed the certifications. As an individual separated from his connection to Sens Mechanical, Pope has no interest in, and received no benefits from, the certifications or the actions the certifications induced. Thus, if Daystar merely asserted a claim for summary judgment based on contract law the Court may have been inclined to enter summary judgment in favor of Pope.

When examining the matter under tort law, however, Pope's assertion that he was acting merely as an agent and cannot be found liable for actions performed on behalf of that corporation does not automatically absolve him of responsibility.

⁴⁹ *Spanish Tiles, Ltd.*, 2009 WL 86609, at *2.

Pope can be found personally liable based on his own participation in the torts of the corporation, including fraud.⁵⁰

Turning to the fraud claim, as noted above, Daystar must plead sufficient facts establishing the following elements: 1) a false representation of material fact; 2) the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; 3) the defendant's intent to induce the plaintiff to act or refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon that representation; and 5) damage to the plaintiff as a result of such reliance.⁵¹ Taken in the light most favorable to Daystar, Daystar has pled sufficient facts to establish four of the five elements for fraud. Daystar asserts Pope's representation that all subcontractors were paid was both a material fact and false, as evidenced by the fact that a subcontractor of Sens filed its own mechanic's lien and breach of contract claims for non-payment.⁵² Pope's representations were intended to, and in fact did, induce Daystar to release funds to Sens, as Daystar relied on the facts within the certifications as truth. Daystar has also alleged monetary damages resulted from relying on Pope's false representations.⁵³ The only element truly in dispute before the Court is whether Daystar has proffered sufficient evidence to support the

⁵⁰ *Id.*

⁵¹ *Duffield Assocs., Inc.*, 2010 WL 2802409, at *4.

⁵² Def.'s Answer to Third-Party Def.'s Mot. for Summ. J at ¶ 1-7.

⁵³ *Id.*

second element of fraud—knowledge of or belief as to the falsity of the representation or the defendant’s reckless indifference to the truth of the representation.⁵⁴ Knowledge may be constructive and will be implied from statements made on the basis of knowledge and in ignorance of its truth, and the second element can be satisfied by mere reckless indifference.⁵⁵ Also, the knowledge element of fraud need not be pled with particularity in Delaware law.⁵⁶

First, Pope denies individual liability on the grounds that any representation made by him was done as an authorized representative of Sens, arguing that he made no representations in his individual capacity.⁵⁷ Daystar does not seek to hold Pope responsible for the actions of his company in this claim.⁵⁸ Rather, Daystar is attempting to hold Pope responsible for his own allegedly fraudulent tortious conduct.⁵⁹

Second, Pope contends Daystar has “failed to allege any facts that would support its contention that Mr. Pope had knowledge of the falsity of the statement in the Applications and Certifications for Payment, aside from his signature on the

⁵⁴ Compare generally Reply Brief in Supp. Of Mot. for Summ. J., with generally Def.’s Answer to Third-Party Def.’s Mot. for Summ. J.

⁵⁵ 37 C.J.S. Fraud §41; *Duffield Assoc., Inc.*, 2010 WL 2802409, at *4.

⁵⁶ *Id.* at *4.

⁵⁷ Reply Brief in Supp. Of Mot. for Summ. J. at ¶ 4–7.

⁵⁸ Def.’s Answer to Third-Party Def.’s Mot. for Summ. J at ¶ 1–7.

⁵⁹ *Id.*

documents themselves.”⁶⁰ On the other hand, Daystar contends Pope’s signature is precisely the fraudulent conduct at issue.⁶¹ Daystar asserts the signature on the documents constitutes Pope’s knowledge or reckless disregard as to the truth or falsity of the statements.⁶² In its answer, Daystar points out how Pope has not disputed whether the signature was Pope’s genuine signature.⁶³ Also, Daystar highlights Pope’s failure to acknowledge the language of the certification itself avers that Pope possessed first-hand knowledge that payment had been made to all subcontractors and no claims were outstanding.⁶⁴

Next, minimal involvement in a fraudulent scheme is sufficient for this Court to find personal liability.⁶⁵ As such, Pope need not be the grand architect of the tortious scheme to be found liable personally for fraud.⁶⁶ This Court has said, “a ‘word, even a nod or a wink or a shake of the head or a smile or gesture’ can constitute a fraud if the intent is to induce action by causing belief in a false fact or a non-existing fact.”⁶⁷ Notwithstanding, Pope’s alleged minimal involvement in inducing Daystar’s reliance on the certification, Pope may still be found personally

⁶⁰ Third-Party Def.’s Mot. for Summ. J. at 7.

⁶¹ Def.’s Answer to Third-Party Def.’s Mot. for Summ. J at ¶ 4–7.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See e.g., Duffield Assoc., Inc.*, 2010 WL 2802409, at *5 (finding small gestures and minimal involvement may constitute sufficient personal participation).

⁶⁶ *Id.*

⁶⁷ *Id.*

liable.⁶⁸ As noted earlier, Daystar asserts Pope actively participated in the alleged fraud when he attested to having first-hand knowledge that the payments were made and no claims were outstanding.⁶⁹ When Pope executed the certifications he was attesting he had personal knowledge that the representations therein were true and accurate. Executing the certifications may amount to personal participation in and of itself. Even if Pope was minimally involved, Pope can be found to have “ratified and approved” the representations contained in the certification by executing and signing the forms.⁷⁰ As such, a reasonable fact finder could find that Pope is personally liable for the fraudulent representations contained in the certifications.⁷¹

Despite Pope’s arguments to the contrary, it is possible that Pope may be found individually liable for signing what are alleged to be false certifications on behalf of Sens.⁷² Even though the act of signing the certifications was undertaken while Pope was acting in his official capacity as a Sens agent, a corporate officer or agent who commits fraud may be personally liable to the party injured by the fraud where that officer actively participated in the fraud.⁷³

⁶⁸ *Id.*

⁶⁹ Def.’s Answer to Third-Party Def.’s Mot. for Summ. J at ¶¶ 4–7.

⁷⁰ *Spanish Tiles, Ltd.*, 2009 WL 86609, at *3 (quoting *Brasby*, 2007 WL 949485, at *8).

⁷¹ *Id.*

⁷² See generally, *Spanish Tiles, Ltd.*, 2009 WL 86609; *Duffield Assoc., Inc.*, 2010 WL 2802409.

⁷³ 3A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 1143 (2002).

A decision on Pope's personal involvement in the alleged fraud requires findings of fact in addition to findings of law. While the Court may consider the merits of legal arguments, this Court will make factual and legal findings at trial not at this time. Whether Pope actively participated in fraudulent tortious conduct as an individual or agent and what knowledge Pope had when executing those agreement are questions of both fact and law. Both of these questions are inextricably intertwined with whether the alleged fraud in fact occurred. Daystar has pled sufficient facts to support a claim for Pope's personal liability for tortious fraud and genuine issues of material fact remain at issue. As such, Pope is not entitled to summary judgment as a matter of law.

Conclusion

Considering foregoing, this Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes, Judge

cc: Prothonotary
Kevin W. Gibson, Esquire