STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-2018-02

CHARLES R. MAPLES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ORDER ON CROSS-MOTIONS FOR
	)	PARTIAL SUMMARY JUDGMENT
EVAN CONTORAKES, et al.,	)	
	)	
Defendants.	)	

Plaintiffs Charles Maples and Kathy Brown have moved for summary judgment on Counts I-V,[1] VII, and IX of their Complaint and all three Counts of the Counterclaim. Defendants Evan Contorakes, Cheri Contorakes, Compass Harbor Village, LLC, and Compass Harbor Village Condominium Association (collectively "Defendants") oppose Plaintiffs' motion and move for summary judgment in their favor on Counts VI-VIII and X of Plaintiff's Complaint. Pursuant to the authority granted it by M.R. Civ. P. 7(b)(7), the Court exercises its discretion and rules on the motion without holding oral argument.

FACTS

Compass Harbor Village, LLC (the "LLC") is the declarant and owner of condominium units located in Bar Harbor, Maine that are known collectively as the Compass Harbor Village Condominiums, or "Compass Harbor." (Def's Supp'g S.M.F. ¶ 1.) The LLC created the Compass Harbor Village Condominiums in 2007 and the Compass Harbor Village Association (the "Association") was incorporated on or about July 18, 2007. (Pl's Supp'g S.M.F. ¶¶ 3-4.) Evan Contorakes is the sole member of the LLC and a director and officer of the Association. (Pl's

[1] Plaintiffs' introduction to their memorandum of law states that they "move for summary judgment on Counts 1-4, 7 and 9 in their Complaint...." However, Plaintiffs raise an argument in support of summary judgment on Count V in the body of their memorandum. (Pl's Mot. Summ. J. 11-13.)

Supp'g S.M.F. ¶ 2.) Cheri Contorakes is Mr. Contorakes's wife and also a director and officer of the Association. (Def's Supp'g S.M.F. ¶ 3.) The Contorakeses are the only officers and board members of the Association, appointed in the first instance by the LLC, and the LLC has at all times owned more than fifty percent of Compass Harbor's units. (Pl's Supp'g S.M.F. ¶¶ 6, 21-23.)

In 2007, the LLC sold condominium units to Charles Maples and Kathy Brown. (Def's Supp'g S.M.F. ¶ 4.) Mr. Maples was granted a possessory interest in his unit on July 31, 2007 and Ms. Brown was granted a possessory interest in her unit on July 27, 2007. (Def's Supp'g S.M.F. ¶¶ 8-9.) The condominium units were subject to the terms of the Declaration of Condominium (the "Declaration") as well as the Bylaws of the Association. (Def's Supp'g S.M.F. ¶ 5.)

Plaintiffs have moved for summary judgment on several counts of their Complaint: breach of contract (Count I), breach of fiduciary duty (Count II), unjust enrichment (Count III), specific performance (Count IV), violation of Maine's Nonprofit Corporation Act (Count V),[2] and declaratory judgment (Count IX)[3]. Plaintiffs have also moved for summary judgment on all three counts of Defendants' Counterclaim: Breach of contract (Count I), unjust enrichment (Count II), and quantum meruit (Count III).

Defendants oppose Plaintiffs' motion, and move for summary judgment on four counts of the Complaint: Breach of 33 M.R.S. § 1604-113 (Count VI), fraud (Count VII),

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[2] Although Count V is labeled "Specific Performance; Maine's Nonprofit Corporation Act," specific performance is not a remedy for statutory violations and Plaintiffs do not request that anything be specifically performed pursuant to that Count. (Pl's Compl. ¶¶ 57-60.) As explained in more detail below, Plaintiffs seek an award of costs and attorney fees pursuant to 13-B M.R.S. § 715(2)(A) in Count V.

[3] Specifically, Plaintiffs seek a declaratory judgment that Defendants have violated the Declaration and Bylaws and, as such, Plaintiffs are entitled to a "disgorgement" of all assessments paid. (Pl's Compl. ¶ 103.)

personal liability of Mr. Contorakes and Ms. Contorakes (Count VIII), and violation of Maine's Unfair Trade Practices Act (Count X). Plaintiffs oppose Defendants' motion.

STANDARD OF REVIEW

"Summary judgment is no longer an extreme remedy." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18. "Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment per se." *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646 (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)). Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CityMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774 (quotation omitted). To survive a defendant's motion for summary judgment, the plaintiff must establish a prima facie case for every element of the plaintiff's cause of action. *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 26, 133 A.3d 1021. "When a plaintiff has the burden of proof on an issue, a court may properly grant summary judgment in favor of the defendant if it is clear that the defendant would be entitled to a judgment as a matter of law if the plaintiff presented nothing more than was before the court" when the motion was decided. *Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp.*, 2005 ME 29, ¶ 9, 868 A.2d 220.

DISCUSSION

I. The Defendants Are Entitled to Summary Judgment on Count VI of the Complaint Because it is Barred by the Statute of Limitations.

Count VI of the Complaint alleges a breach of 33 M.R.S. § 1604-113, which governs the implied warranty of quality for condominiums under the Maine Condominium Act (the "Act"). The Act imposes a six-year statute of limitations for actions alleging a breach of the implied warranty of quality, although the parties may agree in writing to reduce the period to no less than two years. 33 M.R.S. § 1604-115(a). The limitations period runs "*regardless of the purchaser's lack of knowledge of the breach* . . . [from] the time the purchaser . . . enters into possession . . . ." *Id.* § 1604-115(b)(1) (emphasis added).

Plaintiffs filed their Complaint on November 30, 2016. Mr. Maples was granted a possessory interest in his unit on July 31, 2007 under the Quitclaim Deed attached to the Complaint. (Def's Supp'g S.M.F. ¶¶ 8; Pl's Compl., Ex. A.) Ms. Brown was granted a possessory interest in her unit on July 27, 2007 under the Quitclaim Deed attached to the Complaint. There is no factual dispute that Plaintiffs filed their Complaint on November 30, 2016—well outside of the six-year limitations period provided for in 33 M.R.S. § 1604-115(a). (Def's Supp'g S.M.F. ¶ 7.)

Plaintiffs acknowledge that section 1604-115 facially applies to their claim for violation of section 1604-113, but urge the Court to apply a common law "discovery rule" and toll the running of the statute of limitations to the "summer of 2016" based on their testimony that that is when they first discovered the Defendants' breach. *See Dunelawn Owners Assoc. v. Gendreau*, 2000 ME 94, ¶ 14, 750 A.2d 591. Plaintiffs' reliance on *Dunelawn* is misplaced. The *Dunlawn* Court held that the statute of limitations provided for in section 1604-115 barred the statutory claim for breach of warranty brought under section 1604-

113, and went on to analyze whether the "discovery rule" would nonetheless apply to plaintiffs' common law claims. The Court ultimately held that in the absence of a fiduciary duty, the "discovery rule" would not be applied to the plaintiffs' common law claims. This is not at all the same as holding that the existence of a fiduciary duty requires the application of the "discovery rule" to statutory section 1604-113 warranty claims, as Plaintiffs would have the Court do in this case. The *Dunelawn* Court assumed that the "discovery rule" *cannot* be applied to section 1604-113 actions regardless of the existence of a fiduciary relationship, presumably based on the plain language of section 1604-115(a): ". . . a cause of action for breach of warranty of quality, *regardless of the purchaser's lack of knowledge of the breach*, accrues: (1) As to a unit, at the time the purchaser to who the warranty is first made enters into possession if a possessory interest was conveyed. . . ." (emphasis added). The emphasized language makes clear that the Legislature specifically intended that the discovery rule would not be applied to claims for breach of warranty under the Act—hence why the *Dunelawn* Court declined to address the issue in its opinion.

Finally, tolling the statute of limitations in this case through application of the "discovery rule" would be inconsistent with the rules of construction for and the purpose of a statute of limitations. *See Harkness v. Fitzgerald*, 1997 ME 207, ¶ 5, 701 A.2d 370 (quoting *Nuccio v. Nuccio*, 673 A.2d 1331, 1334 (Me. 1996)) ("Statutes of limitation are statutes of repose and . . . should be construed strictly in favor of the bar which it was intended to create . . . . The general purpose is 'to provide eventual repose for potential defendants and to avoid the necessity of defending stale claims.'"). Because there is no dispute that Plaintiffs filed their Complaint well over six years after taking a possessory interest in their condominium units, their claim for breach of the implied warranty of quality pursuant to of 33 M.R.S. §

1604-113 is barred by the six-year statute of limitations provided for in 33 M.R.S. § 1604-115(a). Summary judgment will be entered in favor of Defendants on Count VI of Plaintiffs' Complaint.

II. The Defendants Are Entitled to Summary Judgment on Count VII of the Complaint Because The Evidence of Fraud Is Insufficient as a Matter of Law.

To prevail on a fraud claim, a plaintiff must prove the following elements by clear and convincing evidence:

> (1) A party made a false representation,
> (2) The representation was of a material fact,
> (3) The representation was made with knowledge of its falsity or in reckless disregard of whether it was true or false,
> (4) The representation was made for the purpose of inducing another party to act in reliance upon it, and
> (5) The other party justifiably relied upon the representation as true and acted upon it to the party's damage.

Barr v. Dyke, 2012 ME 108, ¶ 16, 49 A.3d 1280 (citing *Flaherty v. Muther*, 2011 ME 32, ¶ 45, 17 A.3d 640). To withstand a defendant's motion for summary judgment on a fraud claim, a plaintiff "must produce evidence that demonstrates that the existence of each element of fraud is 'highly probable' rather than merely likely." *Barnes v. Zappia*, 658 A.2d 1086, 1089 (Me. 1995); *see also Francis v. Stinson*, 2000 ME 173, ¶ 39, 760 A.2d 209.

The evidence proffered by Plaintiffs is insufficient to show that the existence of fraud is highly probable. First, Plaintiffs have failed to produce any evidence of an affirmative misrepresentation of a material fact. (Pl's Opp'g S.M.F. ¶¶ 12, 16-17.) Instead, Plaintiffs urge the Court to deny summary judgment on the basis that they are "entitled . . . to the reasonable inference" that the Defendants made misrepresentations to Plaintiffs to the effect that "the condominium units were in a functional condominium association that would comply with

Maine law and with the terms of its Declaration and Bylaws." (Pl's Opp'n Mot. Summ. J. 7 (citing *Levin v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178).) This is analogous to the argument rejected in *Barnes*, where the Law Court affirmed an entry of summary judgment in defendants' favor over plaintiffs' argument that "summary judgment was improperly granted because, based on the evidence presented, a jury could reasonably have found that . . . [d]efendants . . . made a series of misrepresentations intended to convey [a] false impression," but plaintiffs failed to produce evidence of "an affirmative misrepresentation of a material fact[.]" *Barnes*, 658 A.2d at 1089. Just as in *Barnes*, Plaintiffs here rely on an inference of misrepresentation but offer no direct evidence thereof. This is insufficient to show that it is "highly probable" that Defendants made any false misrepresentations to Plaintiffs. *See id.*

Furthermore, Plaintiffs have failed to produce evidence showing that they relied on any supposed misrepresentation by Defendants.[4] Plaintiffs miss the mark when they repeatedly assert that there is a dispute of fact as to whether they were provided a copy of the Declaration and Bylaws prior to closing. (Pl's Opp'g S.M.F. ¶¶ 10-11, 15-17.) Even if they were provided copies of the condominium's governing documents prior to closing, it does not necessarily follow that Plaintiffs relied on those documents and Defendant's supposed promise to follow them. In fact, Ms. Brown "testified at her deposition that she never received a copy of the Declaration and By Laws until this very lawsuit" and "further testified that she

[4] In their memorandum, Plaintiffs cite Pl's Opp'g S.M.F. ¶ 94 for the proposition that they relied on Defendants' alleged misrepresentations as to the governance of the condominium association and "would not have purchased the units but for these representations." (Pl's Opp'n Mot. Summ. J. 7.) However, paragraph ninety-four relies on interrogatory answers from the Plaintiffs that are directly contradicted by the deposition testimony summarized above. *See Cormier v. Genesis Healthcare LLC*, 2015 ME 161, ¶ 19 n.5, 129 A.3d 944 (citing *Zip Lube, Inc. v. Coastal Sav. Bank*, 1998 ME 81, ¶ 10, 709 A.2d 733) (holding that where an interrogatory answer is directly contradicted by sworn testimony, a party opposing summary judgment "cannot create a dispute of fact simply by contradicting her own sworn statement.").

did not rely upon those documents at the time she purchased her unit." (Def's Supp'g S.M.F. ¶¶ 10-11.) Mr. Maples similarly testified that he did not rely on any representations of Mr. Contorakes because he couldn't "recall talking to Mr. Contorakes on more than one or two occasions, and that was just in passing." (Def's Supp'g S.M.F. ¶ 16.) Plaintiffs purport to deny these facts in their opposing statement of material facts, but substantively deny only the premise that they were not provided copies of the Declaration and Bylaws.[5] (Pl's Opp'g S.M.F. ¶¶ 10-11, 15-17.) Plaintiffs do not deny that they did not rely on Defendants' supposed misrepresentations with respect to those documents. (*Id.*) In other words, whether the governance documents were provided to Plaintiffs prior to closing is immaterial, when there is (1) no evidence of an affirmative misrepresentation with respect to those documents and (2) no factual dispute that Plaintiffs did not rely on those documents or Defendants' supposed misrepresentations with respect to them.

In sum, Plaintiffs have failed to meet their burden on summary judgment to show that it is "highly probable" Defendants made any false representation, and furthermore it is undisputed that Plaintiffs did not rely on any such representation, even assuming arguendo that one was made. *See Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 26, 133 A.3d 1021; *Barnes*, 658 A.2d at 1089. Defendants' motion for summary judgment is granted with respect to Count VII of the Complaint. Plaintiffs' motion for summary judgment as to Count VII is denied. Summary judgment will be entered in favor of Defendants on Count VII of the Complaint.

[5] With regards to Mr. Maples, there is no dispute that he received a copy of the Declaration at the time he purchased his unit. (Def's Supp'g S.M.F. ¶ 15; Pl's Opp'g S.M.F. ¶ 15.) In the absence of any evidence of a misrepresentation with respect to the Declaration or of Mr. Maples' supposed reliance on that misrepresentation, the fact is immaterial.

III. The Defendants are Entitled to Summary Judgment on Count VIII of the Complaint Because There Is No Basis on Which to Hold Evan Contorakes or Cheri Contorakes Personally Liable.

Count VIII of the Complaint does not state a cause of action; rather, it alleges individual liability on the part of Evan Contorakes and Cheri Contorakes for the various wrongs alleged in the Complaint. Although not clearly articulated, it seems Plaintiffs are seeking to hold the Contorakeses personally liable pursuant to several legal theories: (1) as to both Mr. Contorakes and Ms. Contorakes, individual liability for breach of fiduciary duties; (2) as to Mr. Contorakes, personal liability for wrongful acts committed as a director and officer of the Association, and liability as a member of the Association and the LLC pursuant to a "veil piercing" of those two entities; (3) as to Ms. Contorakes, personal liability for wrongful acts committed as a director and officer of the Association, and liability as a member of the Association pursuant to a "veil piercing" of the Association.[6]

Pursuant to the Bylaws, Plaintiffs are members of the Association by virtue of owning Compass Harbor condominium units. (Bylaws, §2.1 (Ex. H).) Plaintiffs argue that the Contorakeses, as officers of the Association, personally owed them fiduciary duties by operation of statute. *See* 13-B M.R.S. § 720(1)(C) ("An officer of a corporation with discretionary authority shall discharge that officer's duties under that authority . . . [i]n a manner the officer reasonably believes to be in the best interests of the corporation *and its members.*") (emphasis added). It is undisputed that Plaintiffs' condominium units were

[6] Plaintiffs seem to conflate the two entity defendants—the Association and the LLC—in their counterargument to the Contorakeses' motion for summary judgment on the issue of personal liability. To be clear, Ms. Contorakes is not a member of the LLC. (Pl's Supp'g S.M.F. ¶ 1.). As explained below, she therefore cannot be held personally liable pursuant to a "veil piercing" of that entity.

subject to the terms of the Declaration. (Def's Supp'g S.M.F. ¶ 5.) Section 13.1(e) of the Declaration provides that:

> The Board of Directors, *and its members in their capacity as members, officers and employees* . . . . Shall have no personal liability in tort to a unit owner or any other person or entity, direct or imputed, by virtue of acts performed by or for them, except for the Board of Directors members' own *willful misconduct* or *gross negligence* in the performance of their duties[.]

(Def's Supp'g S.M.F. ¶ 19.) Thus, even if 13-B M.R.S. § 720(1)(C) imposes fiduciary duties on the Contorakeses as officers of the Association, the Contorakeses cannot be held liable in tort for breaching that duty by Plaintiffs unless the breach amounts to "willful misconduct or gross negligence." Plaintiffs adduce no evidence of willful misconduct or gross negligence on the part of the Contorakeses. They merely provide a laundry list of lapses in the management of the Association that are at most demonstrative of negligence or incompetence. "Willful misconduct" and "gross negligence" are terms of art that require more than mere negligence. *See Leadbetter v. Family Fun Mgmt.*, No. CV-17-173, 2018 Me. Super. LEXIS 34, at *17 (Feb. 6, 2018) ("The concept of 'gross negligence' is a 'synonym for willful and wanton injury' and has been described as the 'equivalent of wanton or reckless misconduct.'") (quoting *Blanchard v. Bass*, 153 Me. 354, 361, 139 A.2d 359, 363 (1958); *Bouchard v. Dirigo Fire Ins. Co.*, 114 Me. 361, 365, 96 A. 244, 246 (1916)); *see also WahlcoMetroflex, Inc. v. Baldwin*, 2010 ME 26, ¶ 16, 991 A.2d 44 (in the context of determining whether a corporate officer is entitled to the protection of the business judgment rule, "[g]ross negligence is defined as 'reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason.'"). In the absence of evidence of willful

misconduct or gross negligence, Plaintiffs cannot hold the Contorakeses personally liable for purported breaches of fiduciary duty arising out of their failings as officers of the Association.

Plaintiffs next seek to hold the Contorakeses individually liable for participation in wrongful acts performed in their capacity as directors and officers of the Association. Corporate officers "who participate in wrongful acts can be held liable for their individual acts, and such liability is distinct from piercing the corporate veil . . . . The individual liability stems from participation in a wrongful act, and not from facts that must be found in order to pierce the corporate veil." *Blue Star Corp. v. CKF Props., LLC*, 2009 ME 101, ¶ 44, 980 A.2d 1270 (quoting *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶ 13, 901 A.2d 189).

Plaintiffs' opposition to Defendants' motion for summary judgment on Count VIII references their own motion for summary judgment on Count II of their Complaint. Plaintiffs' argument as to that count merely cites provisions of the Declaration and Bylaws describing the duties and responsibilities of Directors and Officers of the Association. (Pl's Supp'g S.M.F. ¶¶ 43-47.) The Bylaws are a contract between Association members (i.e., unit owners) and the Association itself, which acts through its Directors. *See Morison v. Wilson Lake Country Club*, 2005 ME 71, ¶ 20, 874 A.2d 885. If the Association has breached the obligations listed by Plaintiffs, then the Association may be liable to Plaintiffs for breach of contract. However, the Directors and Officers of the Association—i.e., the Contorakes—are insulated from personal liability for those breaches by operation of section 13.1(c) of the Declaration. It is undisputed that Plaintiffs' condominium units were subject to the terms of the Declaration. (Def's Supp'g S.M.F. ¶ 5.) Section 13.1(c) of the Declaration provides that:

> The Board of Directors, *and its members in their capacity as members, officers and employees* . . . . Shall have no personal liability in contract to a unit owner or any other person or entity

> under any agreement, check, contract, deed, lease, mortgage, instrument or transaction entered into by them on behalf of the Board of Directors or the Association in the performance of the Board of Directors member's duties[.]

(Pl's Opp'g S.M.F. ¶ 18 (emphasis added).) The same contract that Plaintiffs allege the Association breached provides protection from liability for the Association's officers. Conceptually, when Plaintiffs accepted the terms of the Declaration, they understood the duties owed to them by the Association and, as part of the bargain, agreed not to hold the officers of the Association personally liable for failure to perform those duties. *Cf. Theberge v. Darbro, Inc.*, 684 A.2d 1298, 1301 (Me. 1996) (in the context of piercing the corporate veil, "because the party seeking relief in a contract case is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity [she] is expected to suffer the consequences of the limited liability associated with the corporate business form") (quotation omitted).

In light of the foregoing the Court concludes that the Contorakeses are not personally liable to the Plaintiffs for "wrongful acts" performed in their capacity as officers of the Association or for breaches of their putative fiduciary duties owed to Plaintiffs under 13-B M.R.S. § 720(1)(C).

The Court next addresses whether Plaintiffs have adduced sufficient facts to pierce the "corporate veil" of the LLC or the Association.[7] "As a matter of public policy, 'corporations

[7] The LLC is the declarant of the Compass Harbor Condominiums. "The declarant is a fiduciary for the unit owners with respect to actions taken or omitted at his direction by officers and members of the executive board appointed by the declarant, and acting in those capacities, or elected by the members at a time when more than 50% of the voting rights are held by the declarant." 33 M.R.S. § 1603-103. There is no dispute that the Contorakeses are the only officers and board members of the Association, that they were appointed in the first instance by the LLC, and that the LLC has at all times owned more than fifty percent of Compass Harbor's units. (Pl's Supp'g S.M.F. ¶¶ 6, 21-23.)

are separate legal entities with limited liability.'" *Johnson v. Excl. Props. Unltd., Inc.*, 1998 ME 244, ¶ 5, 720 A.2d 568. Courts are "reluctant to disregard the legal entity and will cautiously do so only when necessary to promote justice." *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 756 n.5 (Me. 1981). "To pierce the corporate veil and disregard the corporate entity, a plaintiff must establish that: (1) the defendant abused the privilege of a separate corporate identity; and (2) an unjust or inequitable result would occur if the court recognized the separate corporate existence." *Blue Star Corp. v. CKF Props., LLC*, 2009 ME 101, ¶ 43, 980 A.2d 1270 (citing *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶ 10, 901 A.2d 189). Whether there has been an abuse of the corporate form is determined by recourse to a twelve-factor balancing test. *See Johnson v. Excl. Props. Unltd., Inc.*, 1998 ME 244, ¶ 7, 720 A.2d 568. With regards to the second prong, "[s]ince piercing the corporate veil is an equitable remedy, it is consistent with equitable principles to disregard the corporate entity where a claimant demonstrates both: (1) some misuse of the privilege of the corporate form; and (2) an inequitable result." *Id.* ¶ 9.

Generally, "[w]hether the corporate form should be disregarded involves questions of fact for a fact-finder to decide." *Blue Star Corp. v. CKF Props., LLC*, 2009 ME 101, ¶ 43, 980 A.2d 1270 (citing *Advanced Constr*, 2006 ME 84, ¶ 10, 901 A.2d 189). However, summary judgment is still proper where the record evidence considered most favorably to plaintiff raises no disputes of material fact that would support piercing the corporate veil. *See id.* ¶ 45; *see also Alt. Nurs'g Care, Inc. v. C.H. Wright, Inc.*, 2003 Me. Super. LEXIS 114, *11-12 (granting summary judgment in favor of individual defendant "[b]ecause the facts properly before the court at summary judgment [did] not support the invocation of the doctrine of piercing the corporate veil . . . .").

The Contorakeses are entitled to judgment as a matter of law on the issue of whether the "corporate veil" of the Association can be pierced. In the nonprofit context, Maine does not recognize member, officer or director liability under a "veil-piercing" theory and there is no evidence in the record that could support a finding that either Mr. Contorakes or Ms. Contorakes is a shareholder of the Association.[8] Under Maine law, even when the corporate form is disregarded, only shareholders of the corporation can be held liable. *Thibodeau v. Cole*, 1999 ME 150, ¶ 7, 740 A.2d 40; *see also Coler & Colantonio, Inc. v. Quoddy Bay LNG, LLC*, BCD-CV-11-45, 2012 Me. Bus. & Consumer LEXIS 16, *6-7 (Bus. & Consumer Ct. Aug. 16, 2012, *Horton, J.*) ("Maine case law makes it clear that only shareholders may be held personally liable on a theory of piercing the corporate veil.") (citing *Thibodeau*, 1999 ME 150, ¶ 7, 740 A.2d 40).[9] The Court could not find any Maine authority allowing the corporate veil of a nonprofit corporation to be pierced in order to hold members, directors or officers of a nonstock, nonprofit corporation personally liable. The Court declines to extend the corporate veil theory on these facts in the absence of precedent from the Law Court.

Mr. Contorakes, as the sole member of the LLC, could be held liable if the corporate form of the LLC is disregarded. *See Blue Star Corp*, 2009 ME 101, ¶ 42, 980 A.2d 1270. However, the facts before the Court to support piercing the corporate veil with respect to the LLC are inadequate as a matter of law to show that Mr. Contorakes abused the privilege of the separate corporate identity of the LLC or that an inequitable result can only be avoided

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[8] Pursuant to 33 M.R.S. § 1603-101, the Association "shall be organized as a nonprofit corporation under Title 13-B[.]" Non-profit corporations are prohibited from issuing shares of stock or paying dividends. 13-B M.R.S. § 407.

[9] This does not foreclose the possibility that a director or officer could be held individually liable for wrongful acts. *Blue Star Corp. v. CKF Props., LLC*, 2009 ME 101, ¶ 44, 980 A.2d 1270. However, as discussed above, because there is no evidence of willful misconduct or gross negligence on the part of either Mr. Contorakes or Ms. Contorakes, Plaintiffs cannot recover from the Contorakeses directly for the purported misconduct that Plaintiffs argue the Contorakeses participated in.

if the corporate form is disregarded. *See Blue Star Corp.*, 2009 ME 101, ¶ 43, 980 A.2d 1270. With respect to the first prong, there is simply no evidence that Mr. Contorakes used the LLC for some improper purpose. While there is some evidence that would superficially seem to satisfy some of the many factors recited by the Law Court in *Johnson*, no reasonable factfinder could conclude that these lapses are the result of "abuse" of the corporate form as opposed to mere incompetence or neglect. *See Johnson*, 1998 ME 244, ¶ 7, 720 A.2d 568. In other words, even though there may be factual disputes with respect to whether Mr. Contorakes mismanaged the LLC or used the LLC to pay Association expenses, they are not material in the absence of any evidence that Mr. Contorakes abused the corporate form to his own benefit or for some fraudulent or unlawful purpose.

Moreover, there is no evidence that an inequitable result can only be avoided by disregarding the corporate form or of "some misuse of the privilege of the corporate form." *Johnson*, 1998 ME 244, ¶ 9, 720 A.2d 568. Plaintiffs limited evidence of encumbrances on the substantial assets of the LLC are inadequate evidence of "an inequitable result." *Id. See also Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶ 12, 901 A.2d 189 (noting in dicta that where "there was no evidence that the corporation was undercapitalized, insolvent, or bankrupt" nor "evidence from which the jury could find that a verdict against [the corporation] would be worth less than a verdict against [the individual defendant personally]" the plaintiffs "did not satisfy the requirements for piercing the corporate veil").

In sum, the Court finds that the Contorakeses are entitled to judgment as a matter of law on the issue of personal liability. The facts cannot support a finding of officer liability on the part of either Mr. Contorakes or Ms. Contorakes in the performance of their duties as officers of the Association based on the limitation on individual liability provided for in the

Declaration. Furthermore, there are no facts to support piercing the corporate veil of the LLC to hold Mr. Contorakes liable as its sole member. Summary judgment will be entered in favor of the Defendants on Count VIII of the Complaint.

IV. Neither Party is Entitled to Summary Judgment on Remaining Counts.

Defendants have also moved for summary judgment on Count X of the Complaint, which states a claim for violation of Maine's Unfair Trade Practices Act ("UTPA"). 5 M.R.S. §§ 205-A through 214. Defendants' grounds for summary judgment on this count is that Plaintiffs failed to comply with the notice provision of 5 M.R.S. § 213. In relevant part, section 213 requires that:

> At least 30 days prior to the filing of an action for damages a written demand for relief, identifying the claimant and reasonably describing the unfair and deceptive act or practice relied upon and the injuries suffered, must be mailed or delivered to any prospective respondent . . . .

Id. § 213(1-A). Defendants point out that Mr. Contorakes never received any notice from either Plaintiff about violations of Maine's UTPA. (Def's Supp'g S.M.F. ¶ 37.)

Plaintiffs point out that the Law Court has held that failure to comply with the notice requirement of section 213 is not jurisdictional and does not preclude Plaintiffs from maintaining a UPTA claim. *Kilroy v. Ne. Sunspaces, Inc.*, 2007 ME 119, ¶ 15, 930 A.2d 1060. *Kilroy* reaffirmed the holding of *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors*, 659 A.2d 267, 273 (Me. 1995), where the Law Court held that it was reversible error to enter summary judgment in favor of the defendant because there was no dispute that the plaintiff had failed to comply with section 213(1-A)'s notice provision. *Kilroy*, 2007 ME 119, ¶ 15, 930 A.2d 1060. Defendants concede that the rule from *Oceanside at Pine Point Condo. Owners Ass'n* forecloses the entry of summary judgment in their favor on this count. The

Court therefore denies Defendants' motion for summary judgment as to Count X of the Complaint.

Count I of the Complaint states a claim for breach of contract, specifically, the Declaration and Bylaws. To prevail on summary judgment, a plaintiff "has the burden to demonstrate that each element of its claim is established without dispute as to material fact within the summary judgment record." *Cach, LLC v. Kulas*, 2011 ME 70, ¶ 8, 21 A.3d 1015. The elements of breach of contract are (1) breach of a material contract term, (2) causation, and (3) damages. Plaintiffs move for summary judgment on the issue of liability only, acknowledging that the issue of damages will entail factual dispute. *See* M.R. Civ. P. 56(c) ("A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."). Thus, at this stage of the proceedings, Plaintiffs must show there is no dispute of fact on the issue of (1) whether Defendants breached a material term of the Declaration or Bylaws and (2) whether that breach caused Plaintiffs damages.

Plaintiffs adduce substantial evidence of breaches of the Declaration and Bylaws. (Pl's Supp'g S.M.F. ¶¶ 13-40.) Notwithstanding the fact that many of the underlying facts are denied or qualified by Defendants, Plaintiffs raise no argument that any of the many breaches listed on page four of their brief are *material* breaches. *See Jenkins, Inc. v. Walsh Bros.*, 2001 ME 98, ¶ 13, 776 A.2d 1229 ("A material breach is a non-performance of a duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end. Whether a material breach has occurred is a question of fact.") (citations and quotations omitted). Furthermore, Plaintiffs make no attempt to show causation. Although Plaintiffs explicate approximately a dozen breaches of the Declaration or Bylaws by

Defendants, Plaintiffs do not argue that a single one resulted in damages.[10] The Court therefore concludes that Plaintiffs have failed to meet their burden on summary judgment as to Count I. Plaintiff's motion for summary judgment will be denied as to that Count.

Count II of the Complaint states a claim for breach of fiduciary duty. As explained above, Plaintiffs cannot recover from the Contorakeses personally on this Count. However, as Plaintiffs point out in their motion, the LLC is a fiduciary for Plaintiffs as unit owners with respect to actions taken or omitted at its direction by the Contorakeses because the LLC appointed them as officers and directors of the Association and at all times has held more than fifty percent of the voting rights of the Association. 33 M.R.S. § 1603-103(a). Thus, under 33 M.R.S. § 1603-103(a), the LLC could be held liable for breach of fiduciary duty based on actions taken by the Contorakeses in their capacity as officers and directors of the Association. Plaintiffs claim that the breaches of contract described in their argument for summary judgment on Count I are also breaches of fiduciary duty.

Notwithstanding the multiple disputes of fact underlying Plaintiffs' breach of contract claim, this is an inadequate basis on which to award summary judgment in Plaintiffs' favor. There is at best a dispute of fact as to whether any of the contract breaches amount to a breach of the duty loyalty. *See Stanton v. Univ. of Me. Sys.*, 2001 ME 96, 773 A.2d 1045 (holding that whether a party has breached a duty is a question of fact); *see also WahlcoMetroflex, Inc. v. Baldwin*, 2010 ME 26, ¶ 19, 991 A.2d 44 (applying Delaware law and holding that gross negligence is required to establish a breach of the duty of care). Moreover, Plaintiffs adduce

[10] Plaintiffs' argument in reply misses the mark. The Court is not holding, as Plaintiffs seem to suggest, that the Maine Condominium act "do[es] not matter." (Pl's Reply Br. 2.) The Court is not dismissing the Plaintiffs' claim for breach of contract. The Court is merely holding Plaintiffs to their burden on summary judgment to present prima facie evidence of every element of their claim.

no evidence of causation. *See Niehoff v. Shankman & Assocs. Legal Ctr., P.A.*, 2000 ME 214, ¶ 8, 763 A.2d 121 ("The same rules of causation generally apply whether the cause of action sounds in contract, negligence, or breach of fiduciary duty."). Even assuming that a breach has occurred, there is no evidence that such breach has caused the Plaintiffs any damages. In sum, Plaintiffs are not entitled to summary judgment on Count II of their Complaint and their motion is denied as to that Count.

Count III of the Complaint does not state a claim, but rather seeks the equitable remedy of unjust enrichment. Plaintiffs do not specifically address this Count in their memorandum, but do argue that they are entitled to the return of all assessments paid in the context of their argument in support of summary judgment on Count IX of the Complaint, which seeks a declaratory judgment pursuant to 14 M.R.S. § 5951 that Defendants have violated the Declaration and Bylaws and an order requiring the Defendants to "disgorge" assessments paid by Plaintiffs. To recover under an unjust enrichment theory, a party must prove (1) that it conferred a benefit on the other party; (2) that the other party had "appreciation or knowledge of the benefit;" and (3) that the "acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Howard & Bowie, P.A. v. Collins,* 2000 ME 148, ¶ 13, 759 A.2d 707 (citing *June Roberts Agency v. Venture Properties,* 676 A.2d 46, 49 (Me. 1996)). Notwithstanding Plaintiffs' failure to make a prima facie showing of any of these elements, the third element requires the resolution of factual disputes. Even assuming that Defendants violated some provisions of the Declaration or Bylaws, material or not, Plaintiffs' entitlement to recovery for those violations, whether in the nature of damages or restitution, requires the resolution of factual disputes over the amount of Plaintiffs' damages or the extent to

which, if any, Defendants' enrichment was unjust. *See* Horton & McGehee, *Maine Civil Remedies* § 7-3 at 175 (4th ed. 2004) ("For restitutionary relief to be afforded, it must be necessary to prevent unjust enrichment; the measure of restitution is the extent of the injustice."). Plaintiffs' motion is denied with respect to Count III and Count IX.

Count IV of the Complaint does not state a claim for a cause of action, but rather seeks the equitable remedy of specific performance of Defendants' obligations under the Declaration and Bylaws. Plaintiffs argument on this Count is premised on their prevailing on Count I (breach of contract) on summary judgment. Plaintiffs have not prevailed on their breach of contract claim and as such the Court can order no remedy, in law or equity. Plaintiffs' motion is denied as to Count IV.

Count V of the Complaint also seeks "specific performance" pursuant to Defendants' alleged violation of 13-B M.R.S. § 715. In their motion, Plaintiffs clarify that they are seeking an award of costs and attorney fees pursuant to 13-B M.R.S. § 715(2)(A), but this is predicated on the Court concluding that Defendants violated 13-B M.R.S. § 715(1) by failing to maintain certain records and failing to permit Plaintiffs to inspect records. Multiple factual disputes preclude the Court from granting summary judgment in Plaintiffs favor on Count V. Plaintiffs adduce no evidence of whether their request to inspect the records was for a "proper purpose" under section 715(1); it is undisputed that Plaintiffs did receive some of the requested records and eventually obtained all of the requested records, and there is factual dispute as to whether the Association's refusal to permit inspection of certain records was in good faith. (Pl's Supp'g S.M.F. ¶¶ 48-55; Def's Opp'g S.M.F. ¶¶ 48, 50, 53, 55.) Furthermore, the Court has not "ordere[ed] inspection and copying of the records demanded," a prerequisite for the Court to order the Association to pay costs and attorney

fees. 13-B M.R.S. § 715(2)(A). Plaintiffs are not entitled to summary judgment on Count V of their Complaint, and their motion is denied as to that Count.

Plaintiffs have also moved for summary judgment on all three counts of the Counterclaim (although they do not seriously develop their argument). The Counterclaim states claims for breach of contract, unjust enrichment, and quantum meruit. It is undisputed that Plaintiffs have refused to pay assessments. Plaintiffs argue this is not a breach of contract because the assessments charged were not made in accordance with the budget approval process required under the Bylaws. Defendants respond that Plaintiffs' reliance on the Bylaws is misplaced and that the assessments were properly made in accordance with the Declaration. Regardless, Plaintiffs argue their failure to pay assessments is excused by Defendants' material breaches. But the materiality of those alleged breaches is very much in dispute. Thus, there are genuine disputes of facts which preclude summary judgment on Court I of the Counterclaim for breach of contract.

The uncertainty surrounding whether Plaintiffs' refusal to pay their assessments puts them in breach of contract forecloses entry of summary judgment on Count II and Count III of the Counterclaim, notwithstanding both sides' agreement that the Declaration and Bylaws are express contracts between the parties. *See* Horton & McGehee, *Maine Civil Remedies* § 7-5(a) at 178 (4th ed. 2004) ("[T]he existence of an express contract between the parties does not limit restitution remedies if the contract has been rescinded, abandoned, or terminated, or if it is unenforceable or invalid.") In other words, if the Defendants fail to prove that Plaintiffs are liable in breach of contract for their failure to pay assessments, this does not foreclose the possibility that Defendants can nonetheless prove that it is inequitable for

Plaintiffs to have enjoyed Compass Harbor without having paid their share of the common expenses.

CONCLUSION

For all the foregoing reasons, the entry will be:

1. Defendants' motion for summary judgment is granted in part and denied in part. Defendants' motion is granted as to Count VI, Count VII, and Count VIII of Plaintiffs' Complaint. Summary judgment is to be entered in Defendants' favor on those Counts. Defendants' motion is denied as to Count X.
2. Plaintiffs' motion for summary judgment is denied.

So Ordered.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

Dated: 2-12-2019

MAHuddy

Michael A. Duddy
Judge, Business and Consumer Docket

Entered on the Docket: 2-13-19
Copies sent via Mail __ Electronically ✓

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2018-02✓

CHARLES R. MAPLES, et al.,

Plaintiffs/ Counterclaim-Defendants,

v.

EVAN CONTORAKES, et al.,

Defendants/
Counterclaim- Plaintiffs.

ORDER ON COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS COUNTS II AND III OF THE COUNTERCLAIM.

This matter comes before the Court on Plaintiffs'/ Counterclaim-Defendants' Charles R. Maples ("Maples") and Kathy S. Brown's ("Brown") (collectively "Counterclaim-Defendants") motion to dismiss Count II and Count III of Defendants'/ Counterclaim-Plaintiffs' Compass Harbor Village, LLC and Compass Harbor Village Condominium Association's (collectively "Compass") Counterclaim pursuant to M.R. Civ. P. 12(b)(6). Compass opposes the motion. Pursuant to the authority granted it by M.R. Civ. P. 7(b)(7), the Court exercised its discretion and will rule on the motion without holding oral argument.

PROCEDURAL POSTURE AND FACTUAL BACKGROUND

Compass Harbor Village, LLC is the developer and declarant of the Compass Harbor Village Condominiums ("Compass Harbor") in Bar Harbor, Maine. (Pl's Compl. ¶ 5.) The Counterclaim-Defendants are the owners of Compass Harbor condominium units. (Pl's Compl. ¶¶ 1-2.) Compass is responsible for the management of the condominium units, including but not limited to: payment of on-going bills, regular maintenance, and collection of dues from the owners of condominiums. (Pl's Compl. ¶ 30.) In their Complaint, Maples and Brown assert eleven causes

of action against Compass arising out of the latter's alleged mismanagement of Compass Harbor, including a count for breach of contract. (Pl's Compl. ¶¶ 37-40.) In its answer to the Complaint, Compass responded with a Counterclaim against the Counterclaim-Defendants based on their alleged failure to pay association dues and other fees. The Counterclaim asserts three causes of action: breach of contract (Count I), unjust enrichment (Count II), and quantum meruit (Count III).

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), courts "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16.17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.*

DISCUSSION

The issue on this motion to dismiss is whether the purported acknowledgement by both parties that a binding contract exists between the parties precludes Compass from pleading claims for unjust enrichment and quantum meruit.[1] The Counterclaim-Defendants argue that because recovery for unjust enrichment is limited to those situations in which "there is no contractual relationship," the apparent mutual acknowledgement of the existence of a valid contract precludes such a claim. *See, e.g., Lynch v. Ouellette,* 670 A.2d 948 (Me. 1996); *see also Hodgkins v. New Eng. Tel. Co.,* 82 F.3d 1226, 1231 (1st Cir. 1996). Compass argues that its Counterclaim merely permissibly pleads alternative theories of relief and, furthermore, that the existence of a contract

[1] For purposes of deciding the instant motion, the analysis is analogous for unjust enrichment and quantum meruit claims.

does not preclude claims for unjust enrichment that arise out of issues outside the subject matter of the contract.

I. MAINE LAW ALLOWS PLEADING IN THE ALTERNATIVE EVEN WHERE A PARTY ALLEGES THE EXISTENCE OF A BINDING CONTRACT

Maine law has long recognized that a plaintiff may allege the existence of a contract and seek recovery under an unjust enrichment theory in the same pleading. Under the Maine Rules of Civil Procedure, a party is specifically permitted to plead in the alternative. M.R. Civ. P. 8(e). Acknowledging a change under Maine law, the Reporter's Note of 1959 provides: "Rule 8(e)(2) permits pleading in the alternative or in hypothetical form. This is a change in Maine law. *Macurda v. Lewiston Journal Co.*, 104 Me. 554, 72 A.490 (1908)." M.R. Civ. P. 8(e) reporter's notes.

While our Law Court has recognized "that the existence of a contract precludes recovery on a theory of unjust enrichment because unjust enrichment describes recovery . . . when there is no contractual relationship," *June Roberts Agency, Inc. v. Venture Properties, Inc.*, 676 A.2d 46, 49 n. 1 (Me.1996), a party "is not precluded from pleading both theories because a factfinder may find that no contract exists and may still award damages on a theory of unjust enrichment." *Id.*; *see also Bates v. Anderson,* 614 A.2d 551, 552 (Me.1992).

Furthermore, Counterclaim-Defendants' reliance on *Lynch* is misplaced. In *GMAC Comm'l Mortg. Corp. v. Gleichman*, the United States District Court for the District of Maine distinguished *Lynch*, explaining that that case merely held that a plaintiff is precluded from any recovery under a theory of unjust enrichment where the trial court had already determined that a contractual relationship existed between the parties. 84 F. Supp. 2d 127, 137 (D. Me. 1999). Here, as in *GMAC Comm'l Mortg. Corp* and unlike in *Lynch*, no such express finding has been made. *Id.* The alleged contract was not attached to any pleading and is thus not before the Court. In the

absence of a judicial determination that a valid contract governs the dispute between the parties, Compass cannot be foreclosed from seeking relief under an unjust enrichment theory.

II. CLAIMS FOR UNJUST ENRICHMENT ARE ALLOWED WHERE THE CLAIM ARISES OUT OF SUBJECT MATTER NOT COVERED BY THE CONTRACT

The United States District Court for the District of Maine has held that a party is not precluded from bringing a claim for unjust enrichment where the claim arises out of subject matter not covered by the contract. *See Fed. Ins. Co. v. Maine Yankee Atomic Power Co.*, 183 F. Supp. 2d 76, 84 (D. Me. 2001) ("It is reasonable to understand [the Law Court's pronouncement that that the existence of a contract precludes recovery on a theory of unjust enrichment] . . . as stating that a contract *covering the same subject matter* forecloses an unjust enrichment claim.") (emphasis added). Compass suggests that this may apply to its claims against the Counterclaim-Defendants, arguing that "as discovery continues evidence will show that Compass provided benefits to [Counterclaim-Defendants] that would be outside any contract and [Counterclaim-Defendants] are obligated to repay to Compass for those benefits that the [Counterclaim-Defendants] should not be allowed to keep without payment." (Def's Opp. Mot. Dismiss 5.)

The Court agrees with the reasoning of *Fed. Ins. Co.* In Counterclaim Counts II and III, Compass claims that is has conferred a benefit on the Counterclaim-Defendants for which it is entitled to compensation. (Def's Countercl. ¶¶ 17-20, 22-24.) At this stage of the proceedings, the Court cannot determine whether the claims stated in those counts fall within the subject matter of the alleged contract.

CONCLUSION

By the reason of the foregoing it is hereby ORDERED:

That the Plaintiffs' motion to dismiss Counts II and III of the Counterclaim is DENIED.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 4/13/18

Richard Mulhern,
Judge, Business and Consumer Court

Entered on the Docket: 4-13-18
Copies sent via Mail __ Electronically ✓