STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 21, 2015)

MICHAEL CAPARCO, SR.,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC 13-1484**
	:	
LEFKOWITZ, GARFINKEL, CHAMPI	:	
& DERIENZO, INC.	:	
Defendant.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision is Plaintiff Michael Caparco, Sr.'s (Plaintiff or Caparco) motion to strike three affirmative defenses from Defendant Lefkowitz, Garfinkel, Champi & DeRienzo, Inc.'s (Defendant or LGC&D) Answer to Plaintiff's Amended Complaint. Defendant opposes Plaintiff's motion and has cross-moved for summary judgment pursuant to Super. R. Civ. P. 56 (Rule 56).

I

Facts and Travel

According to the Amended Complaint, LGC&D was retained by Capco Endurance, LLC (Capco Endurance) and its wholly-owned subsidiary, Capco Steel, LLC (Capco Steel) (collectively, Capco), in July 2011 as Capco's accounting firm to replace its prior accounting firm, Feeley & Driscoll, P.C. (F&D). (Am. Compl. ¶¶ 13-14). Caparco was the Chief Operating Officer of Capco Steel and a member of Capco Endurance. Id. ¶ 3. On October 14, 2011, LGC&D sent a letter to Caparco (the Arrangement Letter), formalizing the terms of its engagement as independent accountants for Capco. (Pl.'s Mot. to Strike, Ex. 1). As set forth in the Arrangement Letter, LGC&D was retained to review the "special-purpose consolidated

balance sheet" of Capco as of December 31, 2010 and the "related special-purpose consolidated statements of loss and changes in members' equity," as well as review cash flows for the same year, and then issue a report. Id. at 1. The special-purpose consolidated financial statements were being prepared in order to comply with the requirements of certain loan agreements between Webster Bank, N.A. and Capco. Id. Relevant to the matters at issue here, the Arrangement Letter, under the heading of "Agreement," contained the following clause:

> "[Capco] and LGC&D or any successors in interest agree that no claim arising out of services rendered pursuant to this agreement shall be filed more than two years after the date of the accountants' report issued by LGC&D or the date of this arrangement letter if no report has been issued. [Capco] waives any claim for punitive damages. LGC&D's liability for all claims, damages, and costs of [Capco] arising from this engagement is limited to the amount of fees paid by [Capco] to LGC&D for the services rendered under this arrangement letter." Id. at 5 (hereinafter referred to as the Limitation of Liability Clause).

The Arrangement Letter was signed on December 1, 2011 by Caparco under a clause that reads "ACCEPTED ON BEHALF OF THE ADDRESSEE." Id.

On December 8, 2011, LGC&D delivered Capco's 2010 financial statements to Capco, which encompassed an adjusting of Capco's 2009 financial statements. (Am. Compl. ¶ 16). LGC&D also adjusted the prepaid workers' compensation expense, accrued expenses, and accrued payroll that resulted in the members' equity being reported as $9,978,604. Id. at ¶¶ 16, 23. Pursuant to a General Indemnity Agreement entered into by Caparco with Arch Insurance Company (Arch) as Capco's bonding company, Caparco would become personally liable to indemnify Arch for all new bonds executed after the date of the agreement, December 22, 2009, if the member's equity of Capco dropped below $10,000,000. Id. at ¶ 9. As a result of this alleged misstatement of the members' equity by LGC&D, Caparco believed he would become personally liable to Arch under the General Indemnity Agreement and allegedly relied on these

numbers in the financial statements to "mak[e] business decisions" and decide "whether to use his personal monies" with respect to Capco's operations. Id. at ¶¶ 20, 25-29. Caparco alleges that LGC&D's financial statements were materially false, and based on his personal risk on the various construction projects under his indemnity agreement, he maintains he suffered substantial personal damages.

Caparco originally commenced this action, along with Capco Steel and Capco Endurance as co-plaintiffs, on March 29, 2013 against LGC&D and F&D as defendants. Pursuant to a bench decision rendered on October 28, 2013 and an Order entered on November 13, 2013, the Court mandated that all claims against F&D be sent to arbitration and all further litigation involving F&D be stayed. See Capco Steel, LLC v. Feeley & Driscoll, P.C., No. PB 13-1484, at ¶ 1 (R.I. Super. Nov. 13, 2013) (Order). The stay did not apply to the instant litigation against LGC&D. Id. at ¶ 6. On October 10, 2014, the plaintiffs moved to amend the Complaint and dismiss certain parties and claims from the case pursuant to Super. R. Civ. P. 15 and Super. R. Civ. P. 41(a)(2). Plaintiffs' motion was granted on October 27, 2014, and an Amended Complaint was filed on October 29, 2014. The Amended Complaint removed Capco Steel and Capco Endurance as plaintiffs and removed F&D as a defendant along with the corresponding causes of action. Following the amendment, the operative Complaint asserts only two claims by Caparco against LGC&D —misrepresentation (as set forth in Restatement (Second) Torts § 552) (Count I) and accounting malpractice (professional negligence) (Count II).

Relevant here, LGC&D filed an answer to the Amended Complaint on December 17, 2014 that included twenty-four affirmative defenses. Among the asserted affirmative defenses, Caparco seeks now to strike three: (i) Third: "The Plaintiff's claims are barred by any time limitations set forth in the contract documents"; (ii) Eighteenth: "The Plaintiff's recovery is

subject to any contractual limitations of liability"; and (iii) Nineteenth: "The Plaintiff's claims are barred by the terms of the contract documents." (Answer to Am. Compl. at 7, 9).

II

Standard of Review

Rule 12(f) of the Rhode Island Superior Court Rules of Civil Procedure (Rule 12(f))[1] permits a party to "stri[ke] from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter." Some commentators have discussed at length whether a motion to strike an affirmative defense should be brought under Rule 12(f) or should more appropriately be brought under Rule 56. See, e.g., Charles Alan Wright et al., 10B Federal Practice & Procedure, Civil § 2737, at 321-22 (3d ed. 1998) (hereinafter Wright & Miller) ("Although a few courts have ruled that a partial summary judgment is not available because a Rule 12(f) motion to strike is the proper procedure, the better approach is to allow Rule 56(d) to be utilized."). As one federal court has noted, where the issue has been discussed, the results have greatly differed. See Krauss v. Keibler-Thompson Corp., 72 F.R.D. 615, 616 (D. Del. 1976). For example, in U.S. Football League v. Nat'l Football League, the court noted that because matters outside the pleading are not normally considered under a Rule 12(f) motion, courts are more inclined to treat the motion to strike as one for partial summary judgment. See 634 F. Supp. 1155, 1165-66 (S.D.N.Y. 1986); see also Ciprari v. Servicos Aereos Cruzeiro do sul, S.A. (Cruzeiro), 245 F. Supp. 819, 820 (S.D.N.Y. 1965), aff'd, 359 F.2d 855 (2d Cir. 1966) ("Since there are some facts outside the pleadings which are stipulated or otherwise beyond

[1] "[W]here the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule." Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985). Because Rule 12(f) is very similar to its federal counterpart, this Court will look to federal decisions interpreting the rule for guidance. See Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense . . . on motion made by a party . . . .").

dispute and which ought to be considered on this motion, it is treated as one for partial summary judgment."); cf. Int'l Ship Repair & Marine Servs., Inc. v. St. Paul Fire & Marine Ins. Co., 944 F. Supp. 886, 891 (M.D. Fla. 1996) ("[P]artial summary judgment may be used by the Court to dispose of affirmative defenses. The effect being that if the moving party sustains its burden, then the affirmative defenses will be struck by the Court.").

Motivating the court in U.S. Football League to treat the National Football League's (NFL) motion to strike as a motion for partial summary judgment was the fact that the NFL attached over 150 exhibits to its memorandum; the court could not question that such documents would be relevant to its determination of whether to strike portions of the complaint. See U.S. Football League, 634 F. Supp. at 1166 (citing Lipsky v. Commonwealth United Corp., 551 F.2d 887 (2d Cir. 1976)). Notwithstanding the cases allowing motions to proceed under Rule 56, the Krauss court focused on the actual language of Rule 56—that a motion therein "refers to a motion directed toward 'all or any part' of a 'claim'"—and found that a motion to strike affirmative defenses does not squarely fall under that limited definition.[2] Krauss, 72 F.R.D. at 616 (refusing to treat motion to strike affirmative defenses as a motion for summary judgment under Rule 56 and instead considered the motion only as one under Rule 12(f)); accord Bernstein v. Universal Pictures, Inc., 379 F. Supp. 933, 936 (S.D.N.Y. 1974), rev'd on other grounds, 517

[2] Despite this textual argument, partial summary judgment is still more appropriate. See Wright & Miller, supra, § 2737, at 322. The commentators explain this conclusion:

> "This is true even though Rule 56(d) refers only to a motion directed toward 'all or any part' of 'a claim.' The fact that the order is directed at defensive matter should not prevent it being issued inasmuch as a partial adjudication would serve a useful purpose and remove any prejudice that plaintiff otherwise might suffer if the issue were presented to the jury." Id.

F.2d 976 (2d Cir. 1975) (noting Rule 12(f), and not Rule 56, is proper procedure to seek dismissal of affirmative defenses).

Plaintiff has not set forth the rule upon which his motion to strike is based. In opposition, Defendant has cross-moved for partial summary judgment under Rule 56 on the issue of Caparco's individual recovery in light of the provision in the Arrangement Letter. The Rhode Island Supreme Court has not yet squarely addressed the limited issue of whether a Rule 12(f) versus a Rule 56 motion is the proper procedure; however, one Superior Court trial justice has, in fact, discussed the divergence of authority. See Rowey v. Children's Friend & Servs., No. C.A. 98-0136, 2003 WL 23196347, at *3 (R.I. Super. Dec. 12, 2003). There, the court ultimately determined the reasoning set forth in Wright & Miller and the cases cited therein to be persuasive—explaining that Rule 56 is the better approach to address affirmative defenses because Rule 12(f) precludes the consideration of matters outside the pleadings. See id. (citing Wright & Miller, supra, § 2737 at 321). Be that as it may, the Court believes that the controlling issue on which rule should apply (and stemming therefrom, what standard of review should apply to Plaintiff's motion) should be whether the Arrangement Letter constitutes a "matter outside the pleading"; indeed, there can be no question that consideration of this agreement is essential to adjudicating the ultimate issue pending before the Court.

Neither the initial Complaint nor the Amended Complaint attached the Arrangement Letter, or any other documents for that matter. As our Supreme Court has made clear, "matters outside the pleading" (within the context of a Rule 12(b)(6) motion) consist of any and all extraneous materials not contained within the "four corners" of the complaint. See, e.g., Multi-State Restoration, Inc. v. DWS Props., LLC, 61 A.3d 414, 417 (R.I. 2013) (finding if trial justice considers documents neither mentioned in nor attached to complaint, then motion to dismiss will

automatically be converted to motion for summary judgment). Such extraneous information may be considered by a trial justice, however, only if it is attached to the complaint. See id. at 417 n.2 (citing Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) ("[D]ocuments attached to a complaint will be deemed incorporated therein by reference.")). Specifically, as to this issue, the Bowen Court explained that "[t]he mere fact that a pleading mentions or refers to a document-without attaching it to the pleading-does not cause that document to be incorporated by reference as if the pleader had appended it to the pleading." Bowen, 818 A.2d at 726; see also Kent, R.I. Civ. Prac. § 10.3, at 100 (1969) (discussing document will be incorporated by reference in a complaint if referred to explicitly and "annexed to the complaint"). While the Amended Complaint references the October 14, 2011 Arrangement Letter, Plaintiff does not "annex" it thereto. See Am. Compl. ¶ 15. Accordingly, following the reasoning of the cited authority above and based on the "better approach" of treating such motions as motions for partial summary judgment, the Court will treat Plaintiff's motion to strike as a motion for partial summary judgment.[3] This conclusion is especially appropriate considering Defendant has itself moved for partial summary judgment on the very issue of whether Caparco's claims are precluded under the terms of the Arrangement Letter.

With that said, the Court notes that "[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." Estate of Giuliano v. Giuliano,

[3] The Court is aware of the requirement that, at least for purposes of a motion under Super. R. Civ. P. 12(b)(6), "whenever a motion to dismiss is treated as a motion for summary judgment, 'all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.'" St. James Condo. Ass'n v. Lokey, 676 A.2d 1343, 1345 (R.I. 1996). In this case, Plaintiff has not set forth the grounds on which he bases his motion to strike. Even if such a "notice" requirement was applicable to Rule 12(f) motions, the Court's election to treat the present motion as one for partial summary judgment and to consider "matters outside the pleading" causes no harm to Defendant. Both parties specifically rely on the Arrangement Letter, fully contemplating that the Court would review such document in its decision of the within motion.

949 A.2d 386, 390 (R.I. 2008) (internal quotation marks omitted). Summary judgment is appropriate "'[i]f [the court] conclude[s], after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving party is entitled to judgment as a matter of law . . . .'" Empire Fire & Marine Ins. Cos. v. Citizens Ins. Co. of Am./Hanover Ins., 43 A.3d 56, 59 (R.I. 2012) (quoting Pereira v. Fitzgerald, 21 A.3d 369, 372 (R.I. 2011)). Moreover, it is important to note that in opposing a motion for summary judgment "the nonmoving party carries the burden of proving by competent evidence the existence of a disputed issue of material fact and 'cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" Classic Entm't & Sports, Inc. v. Pemberton, 988 A.2d 847, 849 (R.I. 2010) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996)).

III

Discussion

The entirety of this dispute centers on whether the Limitation of Liability Clause, reproduced supra, should apply to Caparco's claims. Caparco advances several arguments in support of his motion to strike the Third, Eighteenth, and Nineteenth Affirmative Defenses from LGC&D's Answer. First, Caparco requests the Court make a determination that the damages alleged in the Amended Complaint were suffered by him personally and are not derivative of any claims by Capco. Additionally, Caparco argues his individual claims cannot be subject to the provision in the Arrangement Letter because Caparco did not sign the letter in his individual capacity; as he argues, he signed the letter only in his corporate capacity as an officer of Capco. Indeed, Caparco maintains his claims against LGC&D arise independently from any specific contractual relationship between LGC&D and Capco. In opposition to the motion, LGC&D

argues that the claims do, in fact, arise out of the services rendered by LGC&D pursuant to the Arrangement Letter and thus should fall within the Limitation of Liability Clause. Furthermore, it alleges Caparco was at least a third-party beneficiary of the agreement and is subject to the provision regardless of whether he signed the letter individually or on behalf of Capco.

A

Derivative Versus Direct Claims

Taking up first the issue of whether Caparco's claims are derivative of the claims of Capco, Caparco maintains that any losses he suffered were suffered by him personally, and accordingly, are separate and apart from any claims Capco would have against LGC&D for professional malpractice.[4] In the Amended Complaint, however, Caparco alleges that he used "personal monies to make loans to Capco Steel in order to fund working capital, and to pay expenses and liabilities owed by Capco Steel, as he was concerned about incurring personal liability under the Arch General Indemnity Agreement in the event that Capco Steel's bonded jobs were not completed." (Am. Compl. ¶ 27). Caparco further alleges LGC&D's errors with respect to the reporting of members' equity caused him, inter alia, to make a series of personal loans to Capco and use personal monies to fund Capco's expenses and liabilities in excess of $1,500,000, subjected him to additional tax liability, and forced him to enter into a settlement agreement concerning workmen's compensation in which he personally expended $187,803.19. See id. at ¶¶ 30, 39-42, 46, 48.

As this Court has previously stated, whether or not a suit is derivative in nature is a question of law for the Court to determine. See Dunn v. Shannon, No. 99-2533, 2005 WL 1125315, at *4 (R.I. Super. May 11, 2005) (Silverstein, J.) (citing Dowling v. Narragansett

[4] While Caparco references certain responses to interrogatories that detail his personal losses in his motion, he has failed to provide the Court with this discovery material.

Capital Corp., 735 F. Supp. 1105, 1113 (D.R.I. 1990)). Rhode Island expressly permits a member of a limited liability company (LLC) to bring a derivative action on behalf of that LLC, but only if the statutory requirements set forth in G.L. 1956 § 7-16-56 are first met. In order to determine whether a claim is derivative or direct in nature, our Supreme Court has recently adopted the two-part test set forth originally by the Supreme Court of Delaware[5] in Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004). See Heritage Healthcare Servs., 109 A.3d at 378. The Tooley test focuses on: "'(1) who suffered the alleged harm'" and "'(2) who would receive the benefit of any recovery or other remedy . . . ?'" Id. (quoting Tooley, 845 A.2d at 1033). The difference between derivative and direct claims was explained by the Tooley Court:

> "Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation. A stockholder who is directly injured, however, does retain the right to bring an individual action for injuries affecting his or her legal rights as a stockholder. Such a claim is distinct from an injury caused to the corporation alone. In such individual suits, the recovery or other relief flows directly to the stockholders, not to the corporation." Tooley, 845 A.2d at 1036.

The Court recognizes that while the parties dispute whether Caparco's claims are derivative or direct in nature, the case here is not the usual type of case contemplated by § 7-16-56 or Rule 23.1 of the Rhode Island Superior Court Rules of Civil Procedure. But, by analogy, the same standards are instructive in determining whether Caparco or Capco is the proper plaintiff. Based on the test in Tooley, the party who suffered the alleged harm and who would be

[5] In looking to the Delaware test, the Rhode Island Supreme Court referenced its opinion in Bove v. Cmty. Hotel Corp. of Newport, R. I., 105 R.I. 36, 42, 249 A.2d 89, 93 (1969), explaining that Delaware courts are particularly well versed in the field of corporate law. See Heritage Healthcare Servs., Inc. v. Beacon Mut. Ins. Co., 109 A.3d 373, 378 n.10 (R.I. 2015); accord Marsh v. Billington Farms, LLC, No. 04-3123, 2006 WL 2555911, at *5 (R.I. Super. Aug. 31, 2006) (Silverstein, J.).

entitled to the recovery therefrom is Caparco, and not the company. There is no evidence in the record to suggest that Caparco's personal monies expended or his increased liability under the personal indemnity agreement was actually the liabilities or responsibilities of Capco or that he had since been reimbursed by Capco for those expenses. As a result, there is no basis to determine Capco would be entitled to any remedy for those expenses or damages. According to the Amended Complaint, Caparco expended large sums of personal monies to fund (through loans and other devices) Capco's business operations.

LGC&D attempts to argue that any duty LGC&D owed to Caparco would be derivative of the duty it owed to Capco under the terms of the Arrangement Letter and that Caparco's claims are entirely dependent on the contractual relationship between Capco and LGC&D. While LGC&D was, in fact, retained only by Capco, this argument focuses on the wrong inquiry; the operative inquiry under the Tooley test is on who actually suffered the damages.[6] Specifically, to determine whether a claim is derivative or direct, the LLC member would have to demonstrate the defendant breached the duty owed to him or her and that he or she can prevail without showing an injury to the LLC. See Askenazy, 988 N.E.2d at 467-68. Similar to Askenazy, the duty owed to Caparco was not merely derivative of LGC&D's duty to Capco; Caparco's claims arise from LGC&D's alleged "misstatements and professional incompetence" and were in violation of a tort duty owed to Caparco apart from any duty sounding in contract.

[6] Caparco and LGC&D dispute whether the Massachusetts Appellate Court decision in Askenazy v. KPMG LLP, 988 N.E.2d 463 (Mass. App. Ct. 2013), is applicable to the case at bar. There, the court had to decide whether an arbitration provision in an accounting firm's engagement letter with the manager of two hedge funds to audit the funds also applied to the plaintiffs, the limited partners of those funds. Id. at 464-65. In concluding that the plaintiffs' claims were direct, the court affirmed the Superior Court's application of the test in Tooley, and found that the duty owed to the plaintiffs was not derivative of the accounting firm's duty as auditor but rather the plaintiffs' claims arose from the accounting firm's "misstatements and professional incompetence." Id. at 467.

See Askenazy, 988 N.E.2d at 467; see also Anjoorian v. Arnold Kilberg & Co., No. PC 97-1013, 2006 WL 3436051, at *6 (R.I. Super. Nov. 27, 2006) (Silverstein, J.) ("[A]n accountant's liability will be limited to losses suffered '(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information . . . .'" (quoting Restatement (Second) Torts, § 552)).[7]

Because Caparco operated under the belief that he was personally exposed under the terms of that agreement to indemnify Arch for all new bonds executed thereafter (based on the allegedly erroneous reporting by LGC&D), any injury suffered by him was independent of any harm suffered to Capco. See Am. Compl. ¶¶ 9, 16-17. Thus, any damages awarded against LGC&D would be in favor of Caparco due to LGC&D's negligence and misrepresentations. See Heritage Healthcare Servs., 109 A.3d at 378. As a result, a direct claim is stated in the Amended Complaint.

B

Is Caparco Personally Bound by the Limitation of Liability Clause?

Turning then to the issue of whether Caparco signed the Arrangement Letter on behalf of Capco or, alternatively, whether Caparco is subject to the Limitation of Liability Clause as a third-party beneficiary, the Court will first begin by looking at the express language of the Arrangement Letter. Above the signature line evidencing a signature from Caparco is a clause that states "ACCEPTED ON BEHALF OF THE ADDRESSEE." The Limitation of Liability Clause begins by stating "[t]he Company" (defined as Capco Endurance and Capco Steel together) and "LGC&D" agree that no claim "arising out of services rendered pursuant to this agreement shall be filed more than two years after the date of the accountants' report . . . ."

[7] For a further discussion of the respective duties owed to Caparco and Capco by LGC&D, see infra Sec. III.B.1.

(Pl.'s Mot. to Strike, Ex. 1 at 5). Furthermore, the provision reads that "LGC&D's liability for *all claims, damages, and costs of the Company* arising from this engagement is limited to the amount of fees paid by the Company to LGC&D for the services rendered under this arrangement letter." (Emphasis added). At no point does the Arrangement Letter discuss Caparco's relationship to LGC&D and what duties are owed to Caparco.

It is a general tenet of director and officer liability that officers who sign contracts on behalf of a corporation are not personally liable on those contracts and not bound by the provisions therein. See, e.g., Lerner v. Amalgamated Clothing & Textile Workers Union, 938 F.2d 2, 5 (2d Cir. 1991) ("[A]n agent who signs an agreement on behalf of a disclosed principal will not be individually bound to the terms of the agreement unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." (internal quotation marks omitted)); Joseph v. David M. Schwarz/Architectural Servs., P.C., 957 F. Supp. 1334, 1338 (S.D.N.Y. 1997) ("[A] corporate shareholder or officer who signs an agreement on the corporation's behalf is not bound thereby absent manifest intent to create individual liability, or an applicable statutory exception to this rule." (internal citations omitted)); 7 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 3034, at 165-66 (2013) ("[I]f the contract is in the name of the corporation but is signed merely by the name of an officer with his or her title added, the corporation is bound and the officer is not individually bound, provided, of course, the officer was authorized to act for the corporation."). Even though Caparco did not use his title when he signed the Arrangement Letter, it is abundantly clear he was signing the contract on behalf of the corporate entity. Therefore, based on a reading of the Arrangement Letter, Caparco was neither himself a party to the contract nor anything but a signatory on behalf of Capco.

While true that Caparco did not individually sign the Arrangement Letter and there is no evidence of intent that he would be personally bound by its terms, this conclusion does not end the Court's inquiry. LGC&D argues that the Limitation of Liability Clause must apply to Caparco as well as to Capco because Caparco's tort claims are so closely connected to Capco's engagement of LGC&D that he should be subjected to the contract terms. LGC&D further maintains that Caparco was a third-party beneficiary to the agreement. Indeed, it argues Caparco cannot claim LGC&D owed a duty of care to him in addition to a duty to Capco, while at the same time claiming that the financial statements prepared by LGC&D were not for his benefit. See Anjoorian, 2006 WL 3436051, at *6.

Based on the arguments of the parties, the Court must determine whether separate duties were owed to Caparco as a third party (apart from the contractual duties owed to Capco by LGC&D) and whether Caparco was a third-party beneficiary of the Arrangement Letter, thus bringing him back within the Limitation of Liability Clause.

1

Accountant's Liability to Third Parties

With respect to the issue of duty, as Rhode Island has consistently made clear, whether a legal duty is owed is a determination for the Court to make and not a question of fact, which would require a denial of summary judgment. See, e.g., Maguire v. City of Providence, 105 A.3d 92, 95 (R.I. 2014) ("[I]n the absence of a duty, the trier of fact has nothing to consider and a motion for summary judgment must be granted. As a result, [t]he existence of a duty of care is . . . reserved for the trial justice, not for the jury." (internal quotation marks and citations omitted)). An accountant's duty to third parties (as already concluded, Caparco is, in fact, a third party to LGC&D's relationship with Capco) was previously discussed at length in this Court's

decision in Anjoorian, 2006 WL 3436051, at *5-7. In Anjoorian, the Court compared the three competing tests for determining the duty of accounting professionals to third parties that were outlined in our Supreme Court's decision in Bowen, 818 A.2d 721, 728 n.2. See id. at *5. The Supreme Court rejected the strict privity rule requiring a direct contractual relationship between an accountant and the aggrieved party to sue the accountant for professional negligence or negligent misrepresentation. See Bowen, 818 A.2d at 728 n.2. However, the Court "reserve[d] [this issue] for another day" and declined to adopt a specific test for determining which third parties can file such claims and what relationship needs to exist to maintain such actions. Id. Since Bowen, the Supreme Court has not revisited the issue.

After weighing the three tests (i.e., the near-privity test, the Restatement test, and the reasonable foreseeability rule), this Court, relying on courts of other jurisdictions, found the Restatement (Second) Torts § 552 test (the majority rule) to be the "better-reasoned approach" as "the Restatement test 'properly balances the indeterminate liability of the foreseeability test and the restrictiveness of the near-privity rule.'" Anjoorian, 2006 WL 3436051, at *7 (quoting Nycal Corp. v. KPMG Peat Marwick LLP., 688 N.E.2d 1368, 1372 (Mass. 1998)). Indeed, "[i]n the financial world, there is a significant potential for the widespread dissemination of the information from financial statements beyond the uses for which it was prepared." Id. at *5 (citing Restatement (Second) Torts, com. a (1977)). Section 552 of the Restatement (Second) Torts provides in pertinent part:

> "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

The liability under subsection (1) is limited to

> "loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." Restatement (Second) Torts § 552(2).

Here, Caparco argues under the Restatement test, LGC&D owed him an independent duty of care as a noncontractual third party "who can demonstrate 'actual knowledge on the part of accountants of the limited-though unnamed-group of potential [third parties] that will rely upon the [report], as well as actual knowledge of the particular financial transaction that such information is designed to influence.'" Nycal, 688 N.E.2d at 1372 (quoting First Nat'l Bank of Commerce v. Monco Agency Inc., 911 F.2d 1053, 1062 (5th Cir. 1990)). The United States District Court for the District of Rhode Island has also found that "an accountant should be liable in negligence for careless financial misrepresentations relied upon by actually foreseen and limited classes of persons." Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 93 (D.R.I. 1968).

Essentially, Caparco argues LGC&D, while under an agreement with Capco, owed Caparco a duty separate and apart from their duty to perform the audits in accordance with the terms of the Arrangement Letter. In applying the Restatement test to the case at bar, the Court has no difficulty finding that LGC&D owed a duty to Caparco and that Caparco would, at the very least, have relied on the information supplied by LGC&D in making business decisions with respect to Capco's operations. The fact that Caparco relied on that same information to make decisions about whether to personally fund Capco's business and to make personal loans to Capco does nothing to take away from the fact that LGC&D had actual knowledge Caparco would receive and rely on its report. Specifically, the Amended Complaint alleges LGC&D

knew or should have known that reducing the members' equity for Capco would trigger Caparco's personal liability and that Caparco would rely on the financial statements to make business decisions, and importantly, "whether to use his personal monies to fund the operations . . . and expenses of Capco Steel. (Am. Compl. ¶¶ 17-20). Unquestionably, Caparco alleges LGC&D had both "actual knowledge" of Caparco's receipt and reliance on the financial statements and the specific transactions Caparco would be making in his personal capacity. See Nycal, 688 N.E.2d at 1372. Plainly, this is not a case of an accountant being exposed to liability from a member of a far-reaching class. See Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (recognizing concern exists in accounting malpractice cases where accountants may be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class").

While LGC&D owed Caparco a duty, LGC&D relies on a Rhode Island federal court decision to argue that because Caparco's tort claims arise solely out of the contractual duties to Capco, the Limitation of Liability Clause is nonetheless applicable. See Textron Fin. Corp. v. Ship & Sail, Inc., No. C.A. 09-617 ML, 2011 WL 344134 (D.R.I. Jan. 31, 2011). In Textron, the plaintiff Textron and defendant Ship and Sail, Inc. entered into a credit and security agreement that contained a one-year contractual limitation provision that read: "[a]ny claim which [Ship and Sail] may have against [Textron] arising out of the Agreement or the transactions contemplated herein must be asserted by [Ship and Sail] within one (1) year of it accruing or else it shall be deemed waived." Id. at *1, 7. Contemporaneously with the credit agreement, the other individual defendants signed separate guaranty agreements promising to pay Textron in the event of a default by Ship and Sail. Id. at *1. This provision was not contained in the guaranties. In discussing whether the counterclaims brought by defendants (Ship and Sail and the individual

guarantors) were subject to the one-year limitation provision, the Court found that "[t]he tort claims asserted here in Defendants' counterclaims are so closely connected to the agreement at issue that the Court concludes that the parties necessarily intended for such claims be subject to the limitation provision." Id. at *8. However, in applying the limitation provision to the guarantors' tort counterclaims, the Court's conclusion was inherently predicated on an earlier finding that the credit agreement and the guaranties were executed at the same time, in the same place, and as part of the same transaction as the credit agreement so that, under Rhode Island law, the guaranties should be construed together with the 2008 credit agreement. See id. at *7 (citing R.I. Depositors Econ. Prot. Corp. v. Coffey & Martinelli, Ltd., 821 A.2d 222, 226 (R.I. 2003)). Thus, while the defendants had argued that their tort claims, unlike the breach of contract claims, did not arise out of the credit agreement, the Court found it necessary to apply the same limitation provision to the guarantors for purposes of the tort claims of fraud that it applied to the counterclaim for breach of the implied covenant of good faith and fair dealing. See id. at *7-8.

Unlike Textron, there is no contemporaneous, separate agreement with Caparco that would require the Limitation of Liability Clause here to be imputed to Caparco, and thus, no basis to find that the tort claims should also be subject to the contractual limitation provision. While Caparco's tort claims do arise from the financial statements prepared by LGC&D to Capco, LGC&D was under a wholly-separate duty to those persons "whose benefit and guidance [LGC&D] intends to supply the information" that there were no misrepresentations or errors in their reports that would be relied on by Caparco. See Restatement (Second) Torts § 552. As the Court believes the situation in Textron presents a distinguishable set of circumstances than those presented here, the Court declines LGC&D's invitation to construe that case to require Caparco's

individual claims to be subject to the contractual provision contained in an agreement by and between only Capco and LGC&D. In fact, a literal reading of the language of the provision—that "LGC&D's liability for all claims, damages, and costs *of the Company* arising from this engagement . . . ."—supports the Court's finding that the provision was limited only to "the Company," Capco, and did not extend to any claims by third parties. See Pl.'s Mot. to Strike, Ex. 1 at 5 (emphasis added). LGC&D's duty to Caparco is separate and apart from those contractual duties, and accordingly, Caparco is not subject to the Limitation of Liability Clause.

2

Intended and Incidental Beneficiaries

Lastly, LGC&D in a further attempt to hold Caparco subject to the Limitation of Liability Clause argues that Caparco was a third-party beneficiary of the Arrangement Letter. It argues Caparco was in direct privity of contract with LGC&D as an intended beneficiary of the Arrangement Letter. See Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I. 1990) ("If the third party is an intended beneficiary, the law implies privity of contract." (citing Calder v. Richardson, 11 F. Supp. 948, 949-50 (S.D. Fla. 1935), aff'd, 118 F.2d 249 (5th Cir. 1941))). The Court is not persuaded.

To be an intended beneficiary, as defined in Section 302 of Restatement (Second) Contracts, the parties must directly and unequivocally intend that the promisee give the third party the benefit of the intended promise. See Forcier v. Cardello, 173 B.R. 973, 985 (D.R.I. 1994) (citing Finch v. R.I. Grocers Ass'n., 93 R.I. 323, 330, 175 A.2d 177, 180 (1961) for support that Rhode Island courts look to Restatement (Second) Contracts to determine rights and status of third-party beneficiaries). If a third party is not an intended beneficiary, he or she is an incidental beneficiary. Restatement (Second) Contracts § 302(2). Accordingly, "[a]n individual

who is only an indirect beneficiary of the agreement thus should not be directly bound to the terms of the agreement absent clear evidence of an intent to create individual liability." Lerner, 938 F.2d at 5. Importantly, "'[u]nless the parties to a contract explicitly state otherwise, or absent circumstances which clearly indicate that performance under the contract is for the benefit of a third party, the law presumes that parties enter into a contract for their own benefit and not for the benefit of a third party.'" Forcier, 173 B.R. at 985 (quoting R.I. Depositors Econ. Prot. Corp. v. Ernst & Young, C.A. No. 92–1120, slip op. at 3-4 (R.I. Super. Mar. 11, 1994) (Krause, J.)). The Forcier Court further noted from Ernst & Young: "'[a] promissor's mere awareness that someone other than the promisee may derive a benefit from the promissor's performance under the contract is insufficient to cloak that third party with the mantle of intended beneficiary.'" Id. at 986 (quoting Ernst & Young, No. 92-1120, slip op. at 4).

Here, the express purpose of the Arrangement Letter was to confirm the scope of LGC&D's engagement as independent accountants for Capco Steel and Capco Endurance. There are no facts in the record before the Court to suggest that solely Caparco, in his individual capacity, was intended to receive the exclusive benefit of this agreement. There is a distinct difference between LGC&D providing the information for Caparco's benefit to create a duty of care owed to him, see supra, and intending Caparco to receive the financial statements as an intended beneficiary. In other words, Caparco benefited from LGC&D's engagement enough to be owed a noncontractual tort duty but not enough to warrant his designation as an intended beneficiary who would be in privity of contract with LGC&D and thus bound by the contract terms. The conclusion that Caparco benefited from LGC&D's engagement by Capco to establish an independent duty owed to him comports with the conclusion that he has no legal rights under the contract as an incidental beneficiary. Indeed, Caparco does not need to rely on the contract

to support his claims set forth in the Amended Complaint against LGC&D.[8] Caparco is thus able to walk the fine line between demonstrating he benefited from LGC&D's contract with Capco and avoiding the language of the Limitation of Liability Clause contained therein.

As a result, the Court must grant summary judgment in favor of Caparco, based on the fact that Caparco, as a third party, was owed a separate duty apart from the contractual relationship with Capco and is not subject to the Limitation of Liability Clause. However, such a conclusion in no way means that LGC&D actually breached the duty owed to Caparco or that LGC&D caused Caparco any of his claimed damages. Indeed, these issues are generally fact questions for a jury. See Berman v. Sitrin, 101 A.3d 1251, 1267 (R.I. 2014) ("It is well established that, in a negligence action, whether a particular 'duty has been breached and whether proximate cause [exists] are . . . questions for the factfinder.'" (quoting O'Connell v. Walmsley, 93 A.3d 60, 66 (R.I.2014))). The only issue raised in the present motion is whether the Limitation of Liability Clause should apply to Caparco. As the Court answers this question in the negative, the Court grants Caparco's motion to strike the three affirmative defenses in LGC&D's Answer to the Amended Complaint and holds that partial summary judgment shall enter in favor of Caparco. The Third, Eighteenth, and Nineteenth Affirmative Defenses shall be so stricken.

[8] As an incidental beneficiary, Caparco is not in privity of contract with LGC&D. See Davis, 576 A.2d at 1242. It is worth noting, however, that Caparco does not need to rely on the Arrangement Letter or the terms therein to demonstrate to the Court that he was owed a legal duty. Under § 552 of the Restatement, LGC&D was required to act as a reasonably prudent auditor under like circumstances and if false or misleading information was delivered to him, as a third party, then a breach of that tort duty is alleged. This is not a situation where Capco engaged LGC&D to prepare the audits directly for the benefit of Caparco to establish himself as an intended beneficiary.

IV

Conclusion

After due consideration of the arguments advanced by counsel in their memoranda and after a review of the contractual language of the Limitation of Liability Clause in the Arrangement Letter, the Court hereby grants Caparco's motion to strike the Third, Eighteenth, and Nineteenth Affirmative Defenses of LGC&D's Answer to the Amended Complaint pursuant to Rule 56. As the Court elects to treat Caparco's motion to strike as one for partial summary judgment, partial summary judgment shall enter in favor of Caparco that he is not subject to the Limitation of Liability Clause contained in the Arrangement Letter.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Caparco v. Lefkowitz, Garfinkel, Champi & DeRienzo, Inc.**
CASE NO:	**PC 2013-1484**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 21, 2015**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Matthew T. Oliverio, Esq.** **Christine M. Curley, Esq.**
For Defendant:	**A. Neil Hartzell, Esq.** **Christopher R. Conroy, Esq.**