



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CROWN BANK,) Case No. 213,2022
)
)
Defendant/Counterclaim)
Plaintiff-Below, Appellant,) Court Below: Superior Court
) of the State of Delaware
)
)
v.) C.A. No.: N15C-11-062 EMB
)
)
BCD ASSOCIATES, LLC,)
)
)
)
Plaintiff/Counterclaim)
Defendant-Below, Appellee.)

**APPELLEE BCD ASSOCIATES, LLC'S ANSWERING BRIEF TO
APPELLANT CROWN BANK'S OPENING BRIEF ON APPEAL**

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I. NATURE OF PROCEEDINGS

This dispute stems from a hotel construction project (the “Project”), upon which Appellee BCD was the general contractor, Appellant Crown was the lender, and MRPC was the owner. Although the Project was rife with payment issues caused by Crown, BCD provided a fully operational hotel (the “Hotel”) by January 2015. Yet, BCD did not receive final payment of its contract balance in the amount of \$1,083,677.91. As such, BCD commenced this litigation to recover the remaining amount owed under its contract.

This case, however, is not the first instance of litigation related to the Hotel. A prior bench trial took place in 2017 on the same events relating to the Hotel Project. MRPC commenced litigation against Crown in January 2015, and the case was tried before the Superior Court in December 2017. The Court found in Crown’s favor (Superior Court No. N15C-02-010 EMD) (the “Loan Trial”). The Superior Court’s findings of fact in the Loan Trial are adopted and incorporated into Crown’s Opening Brief on Appeal.

BCD filed its complaint in this litigation against Crown in November 2015 and asserted causes of action for breach of contract and unjust enrichment. Crown answered BCD’s Complaint in December of 2015, but did not include any counterclaims. BCD’s case against Crown was held in abeyance until the MRPC/Crown Trial concluded.

After the Loan Trial concluded, BCD moved to amend its Complaint to add claims for promissory estoppel and misrepresentation. The Court granted BCD's motion, finding that the claims related back to the original complaint. Crown then answered BCD's Amended Complaint in May of 2018, and asserted, for the first time, a number of counterclaims against BCD, including breach of contract and tort claims. BCD moved to dismiss the counterclaims. The Superior Court granted BCD's motion in part, dismissing Crown's counterclaims for breach of contract, and finding that they were both untimely and barred by collateral estoppel/preclusion. The Superior Court allowed Crown's counterclaims for civil conspiracy and fraud to proceed.

A virtual bench trial was held from August 16-18, 2021, and the Superior Court found in favor of BCD on May 2, 2022 in a forty-three page decision. The Superior Court found that BCD proved its claim for breach of contract, and also found that BCD proved its claims for unjust enrichment and promissory estoppel. BCD was ultimately awarded a total of \$1,551,407.57, comprising of its contract balance, retainage, prejudgment interest, and costs. Crown filed an appeal on June 23, 2022, and filed its Opening Brief on September 13, 2022, which BCD now answers.

II. SUMMARY OF ARGUMENT

1. Denied. The Superior Court did not err in 2018 when it partially granted BCD's Motion to Dismiss, and dismissed Crown's counterclaims for breach of contract. Crown's two counterclaims for breach of contract were compulsory pursuant to Del. Super. Ct. Civ. R. 13, and therefore were time-barred, and further did not relate back to any prior claim that should have been raised in 2015 when Crown first filed its Answer. Furthermore, the breach of contract counterclaims are barred by collateral estoppel because the facts were already litigated in the Loan Trial. Therefore, Crown is barred from re-litigating issues that have already been, or could have been, decided in the Loan Trial. Lastly, even if Crown had presented a breach of contract cause of action at trial, the Superior Court already has adjudicated that action by finding that BCD did not breach the Construction Agreement, that it properly completed its contract work and that it is entitled to full payment of all amounts due and owing.

2. Denied. The Superior Court properly found that BCD is the intended third-party beneficiary to the Loan Commitment and the Loan Agreement, and that Crown treated BCD as such notwithstanding any language to the contrary. The Superior Court specifically engaged in a factual review and legal analysis in accordance with applicable New Jersey law and found that BCD is the intended third party beneficiary contractually, factually, and practically. Moreover, even if the

Superior Court found that BCD did not succeed on its breach of contract claim, the Superior Court found that BCD successfully proved its alternative claims for unjust enrichment and promissory estoppel.

3. Denied. The Superior Court properly found that Crown's counterclaims for civil conspiracy and fraud were not supported by the facts presented at trial, as well as the facts presented in in the Loan Trial. The record demonstrates that Crown was an active participant in the construction of the hotel project and that it was well aware of all project costs, including all change order work, when it agreed to pay BCD all amounts due and owing in exchange for completion of the Hotel and a temporary certificate of occupancy. The Superior Court's findings of fact should be afforded deference, and the testimonial and documentary evidence relied upon by the Superior Court firmly support the conclusion that Crown did not establish the required elements for its civil conspiracy and fraud claims.

III. COUNTERSTATEMENT OF FACTS¹

A. The Construction Loan Agreement and the Construction Agreement

On May 31, 2012 Crown and MRPC entered into a loan commitment letter (the “Loan Commitment”).² Thereafter, on December 19, 2012, MRPC entered into a Construction Loan Agreement with Crown (the “CLA”) under which Crown agreed to provide \$12,998,000 (the “Loan Amount”) to MRPC to purchase a hotel property in Newark, Delaware, and to complete construction and improvements at the Property.³ The CLA, like the Loan Commitment, provided that 10% of each progress payment to the general contractor would be withheld as retainage (the “Retainage”) and was to be released to the general contractor upon completion of the Project as evidenced by a Certificate of Occupancy.⁴

On October 9, 2012, BCD entered into an agreement (the "Construction Agreement") with MRPC, whereby BCD acted as the Project’s general contractor.⁵ Notably, throughout the Project, Crown insisted that it did not want to directly communicate with BCD.⁶ Yet numerous communications were exchanged between

¹ Crown repeatedly fails to cite to supporting references in the appendix or record in its statement of facts in violation of Del. R. Sup. Ct. 14(b)(v).

² JX800 at B77.

³ JX84 at A45-A66.

⁴ *Id.*

⁵ JX182 at B1-B20.

⁶ JX481 at A78; JX835 at B98; 8/16/2021 Tr. at A488:17-18 (Deignan).

Crown and BCD, which are well documented in the Trial record.⁷ Further, Crown and MRPC entered into an Assignment Contract, whereby in the event of MRPC's default, Crown assumed all rights under the Construction Agreement with BCD.⁸

B. The Sprinkler Incident

The Project suffered a delay before BCD even mobilized to the Project site. On January 23, 2013, a sprinkler pipe burst, causing significant damages to the Hotel property, which delayed the start of the Project and its completion (the "Sprinkler Incident").⁹ Because the Sprinkler Incident occurred before BCD mobilized to the Project, BCD was not responsible for the resulting damages and MRPC acknowledged that fact.¹⁰ Further, BCD was not responsible for procuring builder's risk insurance coverage for the damages as BCD was only obligated to provide general liability insurance.¹¹ Instead, that responsibility fell to the project owner, MRPC.

Crown was fully aware that the Sprinkler Incident would result in Project delays and increased costs.¹² Despite notice that there would be delays and extra costs, Crown opted to proceed with construction as originally scheduled and refused

⁷ JX952 at B126; JX953 at B128.

⁸ JX130 at A68.

⁹ JX198 at B23; JX203 at B26-B27; 8/16/21 Tr. at A329:6-10 (Deignan).

¹⁰ 8/16/21 Tr. at A331:5-8; A332:3-7 (Deignan).

¹¹ JX182 at B17, JX945 at B125; 8/16/21 Tr. at A337:13-23 (Deignan).

¹² JX195 at B21-B22; JX198 at B23; JX199 at B24-B25, JX203 at B26-B27; 8/17/2021 Tr. at A663:16-20 (Deignan).

to consider a loan extension.¹³ Further, Crown acknowledged multiple times that there could be cost overruns on the Project.¹⁴ Even with this knowledge, Crown continued to fund the Project and engaged in Loan Modifications.¹⁵

C. Payment Applications, Inspections, Fund Disbursements Directly to BCD, and Communications Between BCD and Crown

Before releasing payment to BCD, Crown thoroughly inspected the Project and reviewed any change orders and payment applications.¹⁶ Crown employed Mr. Anthony Mirandi as a construction consultant to perform inspections and prepare reports relating to draw requests.¹⁷ Before Crown released payment to BCD, Mr. Mirandi would review the draw applications, inspect the Project, photograph the Project, and make sure the work was done as reflected in the payment requests.¹⁸ As the Superior Court found in the Loan Trial, which findings of fact are incorporated by reference into Crown's Opening Brief on Appeal,¹⁹ Mr. Mirandi provided credible testimony at the Loan Trial regarding his thoroughness inspecting construction progress and approving payment requests.²⁰

¹³ JX199 at B24-B25.

¹⁴ *Id.*; JX880 at B107-B110.

¹⁵ JX939 at B122-B124; JX441 at B31-B33; JX531 at B36; JX567 at B38-B50.

¹⁶ JX274 at B29; 8/18/2021 Tr. at A866:11-18 (Madigan).

¹⁷ JX954 at A258.

¹⁸ *Id.*; JX274 at B29-B30, JX228 at B28.

¹⁹ The Superior Court acknowledges in its opinion that the parties relied, in part, on evidence admitted in the Loan Trial, which the Court believed made sense. A1470.

²⁰ JX954 at A258-259.

Crown, for its part, reviewed each payment request in detail, and, in fact, Crown occasionally disputed items in BCD's payment applications.²¹ At no point during the Project did Crown object to any of the change orders.²² It is also significant to note that throughout the course of the Project, BCD submitted its payment applications directly to Crown, and received payment for its work directly from Crown, even though MRPC was the owner.²³

The Superior Court also found that on multiple times throughout the Project, BCD and Crown communicated directly with each other regarding Project issues and payment. By way of example, in February 2014, Mr. Thomas Deignan, BCD's CEO, discussed Project payments with Mr. Tim Doyle, Crown's chief credit lending officer.²⁴ Because BCD was not getting paid, Mr. Deignan asked Mr. Doyle whether there any problems with the Project. Mr. Doyle responded that MRPC was current with its interest payments and not in default.²⁵ In fact, after Mr. Deignan and Mr. Doyle spoke, Mr. Doyle followed up to tell Mr. Deignan that it was clear the Project was substantially complete, and that there appeared to be a substantial amount of

²¹ 8/16/21 Tr. at A357:12-15 (Deignan).

²² 8/18/2021 Tr. at A866:11-22 (Madigan).

²³ JX631 at A201; JX662 at B56, JX808 at B97; 8/18/21 Tr. at A806:22-A807:12 (Rodrigues).

²⁴ JX952 at B126-B127; JX953 at B128-B129; 8/16/2021 Tr. at A366:21-A367:1 (Deignan).

²⁵ 8/16/2021 Tr. at A367:21-A368:2. (Deignan).

equity in the Project.²⁶ Mr. Deignan relied on these representations by Mr. Doyle and understood them to mean that MRPC was not in default, which gave him peace of mind that the funding issues would be resolved.²⁷ As a result, BCD continued to work on the Project.

Crown also communicated with BCD when it sought concessions from BCD under the terms of the Construction Agreement and/or the CLA. For example, Crown sought BCD's agreement that its Retainage would be paid from insurance proceeds to be collected at a later date once the Sprinkler Incident claims were settled.²⁸ In response, BCD communicated with Crown several times regarding this request, as well as its Retainage payment, and particularly demanded that BCD's Retainage be held in escrow with a third party.²⁹ Crown never objected to this plan.³⁰ Further, as described in more detail below, at the end of the Project Crown and BCD again communicated directly, and Crown promised to pay BCD for its last payment application and its Retainage in exchange for a completed Project and a Temporary Certificate of Occupancy ("TCO").³¹

²⁶ JX953 at B128-B129.

²⁷ 8/16/21 Tr. at A371:19-20; A372:11-15 (Deignan).

²⁸ JX441 at B31-B33.

²⁹ JX854 at B105; JX857 at B106; 8/16/21 Tr. at A392:13-A393:3 (Deignan).

³⁰ 8/16/21 Tr. at A390:15-20 (Deignan).

³¹ 8/16/21 Tr. at A419:10-16 (Deignan); 8/17/21 Tr. at A579:14-20 (Deignan); 8/18/21 Tr. at A890:7-A891:7 (Patel).

D. Loan Modifications

MRPC and Crown entered into the May Modification in order to ensure that there were sufficient funds to complete the Project.³² But the May Modification did not increase the amount of the loan.³³ Instead, it reallocated loan proceeds. For example, it stated that MRPC's \$1,500,000 Certified of Deposit (CD) will be released and used to establish a \$650,000 P&I reserve for the first mortgage loan only.³⁴ "The remaining funds...shall be used to pay retainage due the General Contractor together with excess funds available from loan proceeds or any other eligible 504 approved use."³⁵

In the end, the May Modification defunded the construction loan of the earned Retainage amounts and reallocated them to pay for other Project-related costs.³⁶ At trial, Crown's president, Mr. Jacinto Rodrigues, admitted that the \$1.5 million CD was never used to pay Retainage, and that Crown kept the \$1.5 million.³⁷ Furthermore, Crown's risk on the Project was significantly reduced because Crown was named, at its insistence, as a dual obligee on the Payment and Performance

³² X939 at B122-B124; JX441 at B31-B33.

³³ JX531 at B36-B37; 8/17/21 Tr. at A713:7-12, A715:13-18 (Rodrigues).

³⁴ JX531 at B36-B37.

³⁵ *Id.*

³⁶ *Id.*; 8/17/21 Tr. at A715:22-A716:14 (Rodrigues).

³⁷ 8/17/21 Tr. at A687:1-14 (Rodrigues).

Bonds.³⁸ During the negotiations, Crown and MRPC also specifically discussed reallocating the contingency budget and the FF&E budget to help pay for change orders.³⁹

In response to Crown's demands, BCD again notified Crown and MRPC that it did not agree to bonding requirements that were beyond the scope of the Construction Agreement and that it would not accept insurance proceeds from the Sprinkler Incident to fund the Retainage payment.⁴⁰ Crown was fully aware that BCD would not accept insurance proceeds to be paid out at a later date as its Retainage, yet it proceeded forward as though BCD had agreed.⁴¹

E. Second Construction Agreement and “Contingency Report”

MRPC was forced to enter into the Second Construction Agreement with funding from a source other than Crown (i.e. Access Point Financial (“APF”)) to pay for furniture, fixtures and equipment (“FF&E”) because Crown had reached its legal lending limit.⁴² Crown was well aware of this need because it had discussed with MRPC reallocating contingency and FF&E budgets to pay for the change orders.⁴³

The email dated June 11, 2014 from Mr. Kevin Crumlish of BCD explained

³⁸ JX441 at B31-B33; 8/16/21 Tr. at A379:22-A378:1-13 (Deignan); 8/17/21 Tr. at A678:13-19 (Rodrigues).

³⁹ 8/16/2021 Tr. at A473:6-13 (Deignan).

⁴⁰ JX481 at B34-B35; 8/17/21 Tr. A702:12-23 (Rodrigues).

⁴¹ 8/17/21 Tr. at A703:17-A704:1 (Rodrigues).

⁴² 8/16/2021 Tr. at A417:4-5; A482:12-21 (Deignan).

⁴³ 8/16/2021 Tr. at A473:6-13 (Deignan).

how the funds for the FF&E under the APF loan would be accounted for, and how the additional funding would free up original construction loan funds for the required change order work that Crown was unable to fund given its legal lending limit.⁴⁴ To track the APF funds as well as other costs and funding sources, BCD maintained a spreadsheet to categorize Project money.⁴⁵ BCD did not share this spreadsheet with Crown as it was merely an internal tracking tool, and also because Crown explicitly told BCD not to communicate directly with it.⁴⁶ Yet, Crown now seeks to use this tracking document as evidence of a plot between MRPC and BCD to defraud Crown. As the Superior Court correctly determined, no such plot occurred.

BCD tracked these costs because the APF funds in particular were being paid directly to BCD.⁴⁷ BCD's June 11, 2014 email was not an attempt to manipulate payment applications and hide increases from Crown.⁴⁸ Rather, the spreadsheet was simply a reconciliation of Project dollars and a summary of funding sources.⁴⁹ Ultimately, BCD's goal was to complete the work required to finish the Project and support the Hotel opening.⁵⁰ BCD accomplished that goal, notwithstanding Crown's

⁴⁴ JX870 at A235; 8/16/2021 Tr. at A484:11-14 (Deignan).

⁴⁵ 8/16/2021 Tr. at A405:4-99:23 (Deignan).

⁴⁶ JX481 at B34-B35.

⁴⁷ 8/16/2021 at A473:21-23 (Deignan).

⁴⁸ 8/16/2021 Tr. at A406:1-3, A487:17-19 (Deignan).

⁴⁹ *Id.*

⁵⁰ 8/17/2021 Tr. at A539:16-18 (Deignan).

numerous instances of late payment, discounted payment, and active interference.⁵¹

F. Funding Issues In Fall 2014, Final Project Costs, and Crown's Promises to BCD⁵²

The Superior Court record well reflects that the Project was troubled from the start and that there were recurring funding issues throughout the Project. In October of 2014, BCD again requested information concerning MRPC's ability to provide funding for completion of the Project and to confirm that completion could proceed without impairment.⁵³ BCD requested that Mr. Patel of MRPC sign a Guaranty Agreement so that BCD would be assured that at the end of the Project there would not be a short payment.⁵⁴ At this point, BCD had no knowledge that its earned Retainage money was no longer in a Crown account, because had it known this fact, BCD would have stopped work immediately.⁵⁵

BCD's concerns regarding Project funding were well-founded. As the Trial Court record reflects, there was a shortfall of over \$700,000 as the Project neared completion.⁵⁶ The Project required a Temporary Certificate of Occupancy ("TCO"),

⁵¹ JX666 at B57; JX683 at B58.

⁵² Note that Crown omitted any discussion of the December 2014 meeting between BCD, MRPC, and Crown in its Opening Brief. Discussion of the meeting is relevant to Crown's position on appeal, particularly regarding BCD's third-party beneficiary status. Also, it helps support the Superior Court's judgment on BCD's promissory estoppel claim.

⁵³ JX605 at A140-141; 8/16/21 Tr. at A403:3-6 (Deignan).

⁵⁴ 8/17/2021 Tr. at A555:20-A556:2 (Deignan).

⁵⁵ 8/16/2021 Tr. at A386:21-A387:5 (Deignan).

⁵⁶ JX639 at B51; 8/18/21 Tr. at A776:20-A777:20 (Rodrigues).

or the Hotel would not be available to open for FF&E deliveries, staff training, and other activities necessary to make the Hotel operational.⁵⁷ Given the shortfall and urgent timeline, Crown prepared a loan amendment on December 18, 2014, which acknowledged that BCD was owed Retainage.⁵⁸ Further, when Crown requested an updated package of all relevant financial information, MRPC provided a breakdown of all Project costs, including BCD's final total amount of \$9,550,000.⁵⁹ Moreover, prior to the foregoing events, on November 1, 2014, BCD submitted Payment Application No. 20 directly to Crown, which included all updated Project costs, including all change orders.⁶⁰

Sometime around December 17, 2014, there were a series of emails exchanged between Crown and MRPC in which Crown requested a meeting with MRPC and BCD.⁶¹ That meeting occurred at the Project site on December 20, 2021.⁶² At the meeting, Mr. Rodrigues, promised Mr. Deignan that in exchange for

⁵⁷ JX888 at B111; JX892 at B114-B115; 8/16/21 Tr. at A416:20-A417:3 (Rodrigues).

⁵⁸ JX657 at B54-B55.

⁵⁹ JX894 at B120.

⁶⁰ JX631 at A201; JX633 at A202.

⁶¹ At trial Mr. Rodrigues initially testified that MRPC, not Crown, requested the meeting, that MRPC controlled the meeting, and that Crown and BCD did not speak much. 8/18/21 Tr. 24:22-25:3; 29:11-30:1 (Rodrigues). Based, at least in part, on that false testimony, the Superior Court did not find Mr. Rodrigues as a credible witness. Moreover, the Superior Court did not find Mr. Rodrigues to be a credible witness in the Loan Trial either. JX954 at A251.

⁶² JX893 at B116-117; 8/16/21 Tr. at A417:13-18 (Deignan).

completion of the Hotel and the necessary TCO, Crown would pay BCD's December payment application immediately, and would pay BCD's Retainage in approximately sixty days when the SBA loan was scheduled to close.⁶³

BCD provided the TCO on December 23, 2014, completed the Hotel, and subsequently delivered a Certificate of Occupancy for the restaurant on January 8, 2015.⁶⁴ Despite BCD's fulfillment of its side of the Agreement, after receiving the TCO, Crown reneged on its promise to pay BCD, refused to further communicate with BCD, and directed BCD to its legal department.⁶⁵

G. Assignment to Crown, Stipulation Between BCD and MRPC

In the spring of 2015, after Project completion, BCD engaged in litigation against MRPC. (Superior Court No. N15L-03-101, the "BCD/MRPC Litigation"). In December 2016, BCD and MRPC entered into a stipulated judgment whereby BCD and MRPC resolved the claims between them, with MRPC stipulating that it owed money to BCD.⁶⁶

When MRPC defaulted under the loan, Crown became the party in interest regarding the Construction Agreement, and it assumed all of MRPC's rights.⁶⁷ In the

⁶³ 8/16/21 Tr. at A419:10-16; 8/17/21 Tr. 55:14-20 (Deignan); 8/18/21 Tr. at A890:9-A891:7 (Patel).

⁶⁴ JX666 at B57; JX683 at B58.

⁶⁵ JX709 at B59; JX722 at B60; 8/16/21 Tr. at A427:3-6; A428:2-5; A430:14-16; A438:22-A439:4; A440:3-6 (Deignan).

⁶⁶ A1250:3-4; A1257:22-A1258:6; A1265:4-21.

⁶⁷ JX130 at A66-A67.

BCD/MRPC Litigation, MRPC never made any counterclaims against BCD, and all claims were resolved by the stipulated judgment.⁶⁸

⁶⁸ A1250:3-4; A1257:22-A1258:6; A1265:4-21.

IV. ARGUMENT

A. The Superior Court Properly Dismissed Crown's Counterclaims for Breach of Contract

1. Question Presented

Did the Superior Court properly dismiss Crown's counterclaims for breach of contract (construction agreement) and breach of contract (performance bond) because the counterclaims were untimely, the statute of limitations was not tolled, relation back did not apply, and collateral estoppel barred the claims? Suggested Answer: **Yes.**⁶⁹

2. Scope of Review

Crown's appeal challenges the Superior Court's November 5, 2018 ruling on BCD's Motion to Dismiss wherein the Superior Court dismissed Crown's counterclaims for breach of contract. Therefore, because the Superior Court's ruling involves questions of law, this Court's scope of review is *de novo*. *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021). The Court must "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Gantler v. Stephens*, 965 A.2d 695, 703–04 (Del. 2009). Further, "this Court may affirm on the basis of a different rationale than that which was articulated by the trial court, if the issue was fairly presented to the trial court." *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

⁶⁹ BCD's Motion to Dismiss at A1191-A1207.

While the trial court must accept well-pleaded factual allegations as true, the trial court is not “required to accept as true conclusory allegations without specific supporting factual allegations. *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006). Further, the trial court is “required to accept only those reasonable inferences that logically flow” from the face of the pleading, and is not “required to accept every strained interpretation of the allegations proposed.” *Id.*

3. Merits of Argument

The Superior Court’s dismissal of Crown’s counterclaims for breach of contract was proper for several reasons. First, Crown’s counterclaims for breach of contract are barred by the statute of limitations, were compulsory, and should have been raised when Crown first answered BCD’s complaint in 2015. Second, even if Crown had been permitted to proceed to trial on its counterclaims for breach of contract, those claims already have been adjudicated by the Superior Court in its finding that BCD properly performed its work under the Construction Agreement and that there was no breach by BCD. Third, Crown impermissibly alleges the same facts for both its breach of contract counterclaims and its fraud claim, and the Superior Court already has determined that Crown did not provide sufficient evidence for its fraud claims. Lastly, the counterclaims are barred by collateral estoppel as the facts were litigated in the Loan Trial and affirmed by a valid and final judgment.

a. Crown's Counterclaims for Breach of Contract Are Compulsory and are Therefore Time-Barred Because the Statute of Limitations is Not Tolled

Breach of contract claims are subject to a three-year statute of limitations (“SOL”). 10 *Del. C.* §8106. The SOL begins to run at the time of the alleged wrongful act even if the claimant is ignorant of the cause of action, although there are limited circumstances in which the limitations period can be tolled. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). In order to toll the SOL, the underlying facts must be “so hidden that a reasonable plaintiff could not timely discover them.” *Krahmer v. Christie's, Inc.*, 903 A.2d 773, 778 (Del. Ch. 2006). The SOL will be tolled where the claimant can demonstrate one of the following exceptions: (1) fraudulent concealment; (2) inherent unknowable injury; or (3) equitable tolling. *Id.* If any one of these tolling exceptions applies, the SOL will still begin to run upon the “discovery of facts constituting the basis of the cause of action, or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery of the injury.” *Id.* at 778-79.

Under fraudulent concealment, which appears to be the doctrine argued by Crown, the plaintiff must prove that the defendant fraudulently concealed necessary facts to put the plaintiff on notice of the truth by an affirmative act of actual artifice that prevented the plaintiff from having knowledge of material facts. *In re Tyson*

Foods, Inc., 919 A.2d 563, 585 (Del. Ch. 2007). Even then, the SOL is only tolled until the plaintiff could become aware of the facts by exercising reasonable diligence. *In re Dean Witter*, 1998 WL 442456 *5 (Del. Ch. Sept. 27, 2013).

Regardless of which theory applies,

“no theory will toll the statute beyond the point where the plaintiff was objectively aware, or should have been aware, of facts giving rise to the wrong. ***Even where a defendant uses every fraudulent device at its disposal to mislead a victim or obfuscate the truth***, no sanctuary from the statute will be offered to the dilatory plaintiff who was not or should not have been fooled.”

Tyson Foods, 919 A.2d at 585. (emphasis added, internal citations omitted).

Crown’s counterclaims for breach of contract included breach of the Construction Agreement, and breach of the Performance Bond.⁷⁰ Crown argues that it was unaware of BCD’s breaches of contract until the Loan Trial because of BCD’s fraudulent concealment, which prevented Crown from asserting its breach of contract claims at the time it answered BCD’s complaint. This argument is meritless, because in its Answer to BCD’s Amended Complaint, Crown alleged that BCD materially breached the Construction Agreement by completing the Project late, and by not protecting the construction site from freezing.⁷¹ Those facts were known to Crown as early as 2013, when the Sprinkler Incident occurred, and BCD put Crown on notice that the Project would be delayed and that extra costs would be incurred.

⁷⁰ A1100-1103.

⁷¹ *Id.*

Crown now seems to assert that BCD's alleged fraudulent concealment of Project costs related to the Sprinkler Incident serves as the basis for Crown's breach of contract counterclaims. Aside from the fact that fraud is not a proper basis for breach of contract (discussed further below), even if BCD's alleged fraud constituted a breach of contract, Crown would still have been on notice of the Sprinkler Incident issues such that it was required to assert the counterclaims at the time it answered BCD's complaint. Here, as the sophisticated lender on a construction loan, Crown was well-aware of all of the costs BCD submitted on the Project. It meticulously reviewed all payment applications before issuing payment, and it inspected Project progress regularly. In November of 2014, when BCD submitted payment application No. 20 with its final costs, Crown was aware, or should have been aware, of any facts giving rise to any alleged wrongdoing by BCD regarding Project costs. Because Crown had full access to BCD's final costs, including all change orders, in late 2014, sufficient facts existed to put Crown on inquiry, which if pursued, should have led to discovery of any alleged injury. Therefore, Crown's attempt to assert breach of contract counterclaims in May of 2018 is untimely, and no theory exists to toll the statute of limitations.

Further, Del. Super. Ct. Civ. R. 13 discusses compulsory counterclaims, and states that "a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the

transaction or occurrence that is the subject matter of the opposing party's claim.” While amendment of a pleading can relate back to the original pleading in a few specific situations, here it can only do so when “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...” Del. Super. Ct. Civ. R. 15(c). Crown’s counterclaims do not arise out of (or relate back to) any transactions or occurrences set forth in Crown’s original answer, because Crown did not assert any counterclaims against BCD based on fraud. Therefore, there is nothing to relate back to.

b. Even if Crown’s Counterclaims for Breach of Contract Were Timely Asserted and/or Related Back, They Have Already Been Adjudicated by the Superior Court in BCD’s Favor

Even if Crown had been permitted to move forward with its breach of contract counterclaims, Crown would not have been successful in proving its claims. Crown argues that had its breach of contract counterclaims been permitted, the claims would have been the subject of discovery and Crown’s trial presentation. From this argument, Crown implies that breach of contract was not included in discovery nor discussed at trial. But that argument is simply false. To the contrary, breach of contract issues (regarding the CLA, the Construction Agreement, and BCD’s performance) and a course of action were presented to and decided by the Superior Court in both the Loan Trial and the trial in this matter. The testimony and evidence

presented at trial demonstrate that BCD completed all of its work under the Construction Agreement, resulting in a complete and operational Hotel.⁷² On the other hand, the Superior Court found that Crown was the party responsible for breaching contractual obligations it owed to BCD. As such, there can be no question that contract performance, and which party breached, was central to the issues at trial.

c. Crown Impermissibly Asserts that BCD's Alleged Fraudulent Conduct is the Basis of its Breach of Contract Counterclaims

In order for a breach of contract claim and a fraud claim to be brought in one litigation, “the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract.” *Cont'l Fin. Co., LLC v. ICS Corp.*, No. CV N19C-07-184 AML, 2020 WL 836608, at *3 (Del. Super. Ct. Feb. 20, 2020).

Despite the fact that Crown originally alleged that BCD materially breached the Construction Agreement and Performance Bond by delivering the Project late and allowing pipes to freeze, Crown now attempts to argue that BCD's alleged fraudulent actions resulted in a breach of contract. In doing so, Crown attempts to revive its breach of contract counterclaims by alleging the same set of facts as it uses

⁷² 8/18/2021 Tr. at A852:14-23 (Madigan).

for its fraud counterclaim, which, as described in further detail below, was properly dismissed by the Superior Court.

d. Crown's Counterclaims for Breach of Contract are barred by Collateral Estoppel

Under the doctrine of collateral estoppel “where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action.” *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991) (citing *Tyndall v. Tyndall*, 238 A.2d 343, 346 (Del. 1968)). Collateral estoppel provides repose by avoiding relitigation, and helps conserve judicial resources. *Id.*

Notably, Delaware does not require mutuality or privity in order to successfully assert collateral estoppel. *Id.* at 1217. Instead, it is sufficient that the party against whom collateral estoppel is asserted was a previous party. *Id.* Collateral estoppel requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment. *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995) (internal citations omitted).

Here, all of the elements of collateral estoppel have been met: (1) the questions of fact essential to the judgment (i.e. that BCD properly performed under the Construction Agreement and is owed payment); (2) were litigated in the Loan Trial;

(3) determined in the Loan Trial; (4) by a valid and final judgment (which Crown incorporates in its brief).

In its opening brief, Crown does not even address the concept of collateral estoppel, while simultaneously adopting the findings of fact from the Loan Trial, and acknowledging that Crown assumed all rights under the Construction Agreement and is an assignee of contracts entered into between BCD and MRPC. Because this subsequent action is based on the same transactions and occurrences and involves the same facts that were offered in the Loan Trial, Crown is precluded from re-litigating the same issues against BCD in the present litigation.

B. The Superior Court Properly Found that BCD is an Intended Third-Party Beneficiary to the Loan Commitment and the CLA

1. Question Presented

Did the Superior Court correctly find that BCD is a third-party beneficiary under New Jersey Law? Suggested Answer: **Yes.**⁷³

2. Scope of Review

As with Crown's appeal regarding the Superior Court's ruling on BCD's Motion to Dismiss, Crown's appeal regarding the Superior Court's findings on BCD's breach of contract claim involves a question of law; therefore, the scope of

⁷³ Joint Pretrial Stipulation and Order at A1289-90. BCD notes that in its "Question Presented," Crown improperly failed to provide "a clear and exact reference to the pages of the appendix" where Crown allegedly preserved this question in the Trial Court.

review is *de novo*. *Backer*, 246 A.3d at 94. In conducting a review *de novo*, the Court must “determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.” *Gantler*, 965 A.2d at 703–04 (Del. 2009).

3. Merits of Argument

The Superior Court correctly found that while BCD is not a signatory party to the CLA, Crown is liable to BCD for breach of its obligations under the CLA because BCD is a third-party beneficiary of the CLA and sustained damages. The Superior Court correctly relied on *Broadway Maint. Corp. v. Rutgers, State Univ.*, 447 A.2d 906, 909 (N.J. 1982) in finding that under New Jersey law, a third-party beneficiary is a person or entity that “the contracting parties intended...should receive a benefit which might be enforced in the courts.” The determination of whether an entity is a third-party beneficiary is “inherently factual” and the key determining factor is the parties’ intent. *K. Hovnanian Companies Ne., Inc. v. Cnty. Of Essex*, No. A-2566-08T1, 2009 WL 2391971, at *7 (N.J. Super. Ct. App. Div. Aug. 6, 2009). This factual analysis is applicable even if the relevant documents contain language that expressly negates any legally enforceable right in a third party. *Broadway Maint. Corp.*, 447 A.3d at 909.

Further, New Jersey law recognizes that parties to a contract can be liable to third parties. N.J.S.A. 2A:15-2 provides that “a person for whose benefit a contract is made may sue on the contract in any court.” As Crown acknowledges, this statute

merely restates established New Jersey law that third-party beneficiaries may sue upon a contract made for their benefit without privity of contract. *Rieder Communities, Inc. v. Twp. of N. Brunswick*, 546 A.2d 563, 566-67 (NJ App. Div. 1988). Moreover, as set forth in BCD’s Opening Brief, courts in other jurisdictions similarly have found that statements made by a construction lender to a contractor can serve as an intent to create third-party beneficiary rights in the contractor.⁷⁴ See *Jim Walter Corp. v. Laperouse*, 196 So. 2d 539, 545 (La. Ct. App. 1967) (holding that lender’s promise to a contractor to finance construction entitled the contractor to look to the lender for payment of its costs).

a. The Cases Cited by Crown Do Not Alter the Factual and Legal Analysis Undertaken by the Superior Court

Crown acknowledges that the Superior Court properly relied on *Broadway Maint. Corp.*, and does not challenge the Court’s engagement in a factual analysis of whether BCD was an intended third-party beneficiary under the CLA. Instead, what Crown seems to challenge is the sufficiency of the factual evidence under cases other than *Broadway Maint. Corp.* But the case law that Crown cites does not contradict the Superior Court’s analysis. Rather, it affirms it. See *Insulation Contracting & Supply v. Kravco, Inc.*, 507 A.2d 754, 758 (N.J. Super. Ct. App. Div. 1986) (finding that “the real test is whether the contracting parties intended that a

⁷⁴ B155.

third party should receive a benefit which might be enforced in the courts.”).

Crown also cites *Stone & Magnanini, LLP v. United Airlines*, 2021 WL 278365, at *5 (N.J. Super. Ct. App. Div. Jan. 28, 2021) to argue that BCD was not an intended third-party beneficiary. However, *Stone* discusses who the parties intended to be a third-party beneficiary in the context of airplane tickets, not the type of entities that can be properly considered third-party beneficiaries in the construction contracting context. *See Stone* at *5 (“Because third-party beneficiaries were not entitled to relief under defendant’s Contract of Carriage, the judge was not required to analyze plaintiff’s status as a third-party beneficiary. On this record, we discern no basis to disturb the judge’s summary judgment decision based on plaintiff’s lack of standing.”).

Crown also relies upon *Labega v. Joshi*, 270 A.3d 378, 386 (N.J. Super. Ct. App. Div. 2022). But *Labega* is distinguishable because it discusses the third-party beneficiary theory only in the context of medical malpractice. Further, the Court in *Labega* also recognizes that the deciding principle in determining third-party beneficiary status is whether the parties to the contract intended the third party to benefit from the existence of the contract. *Labega*, 270 A.3d at 386.

Crown also argues that *1180 Raymond Urban Renewal, LLC v. 1180 Astro Urban Renewal Inv’rs LLC*, 2014 WL 9913181, at *4 (N.J. Super. Ct. App. Div. June 22, 2015) supports its claim that BCD was not a third-party beneficiary. However,

Raymond is distinguishable because the Court in *Raymond* found that “[n]o facts suggest, much less prove, the parties to the Loan Agreement intended to make Bovis a third-party beneficiary.” *Id.*

Here, the Superior Court is able to cite a trial record that is replete with evidence that Crown intended BCD to benefit from the CLA, that BCD properly completed its scope of work, and that Crown did not meet its contractual obligations under the CLA resulting in damages to BCD. The entire purpose of the CLA was to set forth the terms for the financing of the Project, including the terms under which earned Retainage would be withheld and then released to the contractor.⁷⁵ Crown and MRPC intended that BCD would benefit from the CLA, and that benefit to BCD was a material part of Crown’s and MRPC’s purpose in entering into the CLA. Further, Crown took it upon itself to pay BCD directly, and had BCD submit its requests for payment directly to it.⁷⁶ Contrary to Crown’s claims, this very fact and the course of conduct between the parties establishes that BCD was in fact an intended third-party beneficiary under the CLA.

BCD also was entitled to its earned Retainage under the CLA upon completion of the Hotel and a delivery of Certificate of Occupancy. Crown was the party that was holding back the earned Retainage and would issue it to BCD.⁷⁷ Therefore, once

⁷⁵ JX84 at A45-A66.

⁷⁶ JX662 at B56, 808 at B97; 8/18/21 Tr. at A806:22-A807:12 (Rodrigues).

⁷⁷ JX84 at A45-A66.

BCD completed its contractual scope of work on the Project pursuant to the Construction Agreement, supplied a TCO on December 23, 2014, and a Certificate of Occupancy for the restaurant portion on January 8, 2015, and finally delivered the permanent Certificate of Occupancy on April 20, 2015, Crown was contractually required to release Retainage to BCD.⁷⁸

Despite the fact that all required conditions in the CLA for release of the Retainage had been satisfied, Crown refused to pay BCD's Retainage, or its final contract balance, which Crown previously agreed to do. The record establishes that Crown's failure to pay BCD its contract balance and Retainage is a breach of the CLA and that BCD is an intended third-party beneficiary to the CLA. Therefore, the Superior Court's findings must be upheld.

It should also be noted that Crown has not challenged the Superior Court's award of judgment on the Unjust Enrichment and Promissory Estoppel claims. Accordingly, even if the Court's analysis under the *Broadway Maint. Corp.* was wrong (which it was not), BCD is still entitled to recover the full amount of its earned Retainage and final draw request under its alternative theories of recovery.

⁷⁸ JX666 at B57; JX683 at B58; 8/16/21 Tr. at A452:7-10 (Deignan).

C. The Superior Court Properly Found that Crown Did Not Present Sufficient Evidence to Prevail Upon its Civil Conspiracy and Fraud Claims

1. Question Presented

Did the Superior Court correctly conclude that Crown did not prove its claims for fraud and conspiracy because it failed to offer evidence satisfying each and every element of a fraud claim? Suggested Answer: **Yes.**⁷⁹

2. Scope of Review

After trial and on appellate review, regarding factual findings, the Court applies the deferential “clearly erroneous standard” of review. *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016). Under this standard, the Court must be deferential to “historical facts that are based upon credibility determinations [and] also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts.” *Backer*, 246 A.3d at 95. “Factual findings are not clearly erroneous if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.” *Id.* at 94-95 (internal citations omitted). “Where there are two permissible views of the evidence,” the Superior Court’s “choice between them cannot be clearly erroneous.” *RBC*, 129 A.3d at 849.

Crown, however, asserts that “[w]here the trial judge draws factual findings from documentary evidence, this Court undertakes a more active review.” Br. at 30. While the court in *Levin v. Smith*, cited by Crown, comments that it undertook a

⁷⁹ BCD’s Response to Crown’s Opening Brief at B176-180.

“careful review of the record,” the fact that the Court must be more deferential to credibility determinations does not serve to limit the Court’s deference to the factual record and findings, and instead only provides when deference should be even further enhanced. 513 A.2d 1292, 1301 (Del. 1986). As such, Crown does not state correct standard of review of this appeal issue.

3. Merits of Argument

To successfully state a claim for fraud, one must allege:

- (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose;
- (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth;
- (3) the defendant intended to induce the plaintiff to act or refrain from acting;
- (4) the plaintiff acted in justifiable reliance on the representation; and
- (5) the plaintiff was injured by its reliance

DCV Holdings, Inc. v. ConAgra, Inc., 889 A.2d 954, 958 (Del. 2005). Furthermore, where fraud is averred “the circumstances constituting fraud, negligence or mistake shall be stated with particularity.” Del. Super. Ct. Civ. R. 9(b); *Coyle v. Peoples*, 349 A.2d 870, 872 (Del. Super. Ct. 1975), *aff’d*, 372 A.2d 539 (Del. 1977).

Crown’s fraud claims were appropriately decided against it for multiple reasons. As an initial point, aside from the fact that Crown did not offer sufficient evidence demonstrating fraud, Crown cannot maintain a claim for fraud independently from its untimely breach of contract claims, which, as set forth above,

were properly dismissed by the Superior Court. Further, the documents and testimony in the record demonstrate that Crown failed to provide sufficient evidence that BCD committed fraud. Therefore, because Crown's fraud claim is really no different than what would typically count as a breach of contract claim, it has no merit.

a. Crown Cannot Recover on its Fraud Claim as it Arises out of the Same Set of Facts as its Dismissed Breach of Contract Counterclaims

A successful fraud claim must be distinct from a contractual claim, and distinct damages must be alleged with the fraud. *See Cont'l Fin. Co.*, 2020 WL 836608, at *3 (holding that it is impermissible to bootstrap a breach of contract claim into a fraud claim). In other words, the alleged damages sustained due to fraud must be more than a rehashing of damages allegedly caused by a breach of contract claim arising out of the same underlying events. *Id.* Where alleged conduct giving rise to both a fraud and breach of contract claim is the same, “[w]ithout alleged separate and distinct conduct, where a defendant is bound by a contract with a plaintiff, the defendant will not be liable in tort for failure to comply with the contract.” *Ridley v. Bayhealth Med. Ctr., Inc.*, 2018 WL 1567609, at *5 (Del. Super. Ct. Mar. 20, 2018).

Crown attempted to assert a counterclaim for breach of contract arising out of the Construction Agreement, and asserted the same facts for its breach of contract

claim as it did for its fraud claim.⁸⁰ Crown did not allege that BCD breached a duty that was independent of the duties imposed by the Construction Agreement. Therefore, as its breach of contract counterclaims were properly dismissed, Crown cannot now attempt to recover the same damages in a fraud claim where the basis of that fraud claim was an alleged breach of contractual duties. As set forth above, the Superior Court properly found that BCD did not breach the Construction Agreement.

b. The Record Demonstrates that Crown Failed to Prove that BCD Committed Fraud

Following Crown's presentation of evidence at trial, the Superior Court determined that Crown failed to prove that BCD committed fraud. In support of its conclusion, the Superior Court cited to a substantial number of facts in the trial record, finding, among other things, that Crown was a very active participant in the events of the Hotel project and that it was well aware of the financial challenges to the Project caused by the Sprinkler Incident.⁸¹ The Superior Court also found that Crown closely monitored the Draw Request process, and retained Mr. Anthony Mirandi to make site visits on a regular basis to review the work performed by BCD.⁸² Mr. Mirandi also took photos of the Project and reviewed invoices submitted

⁸⁰ A1100-1101.

⁸¹ JX195 at B21; JX198 at B23; JX199 at B24-B25; JX203 at B26-B27; 8/17/2021 Tr. at A663:16-20 (Deignan).

⁸² JX954 at A258-259; JX274 at B29; 8/18/2021 Tr. at A866:11-18 (Madigan).

by BCD for payment.⁸³ As the Court commented, Crown did not make any payments to BCD without first undertaking this process.⁸⁴

The Superior Court also found that Crown continued to lend money to the Project, even after it knew that there were cost overruns and that all outstanding amounts to complete the Hotel, including Retainage, had been disclosed to Crown as of December 17, 2014.⁸⁵ The Court found that Mr. Rodrigues met with representatives of MRPC and BCD on December 20, 2014, specifically to discuss completion of the Hotel. At that meeting, Mr. Rodrigues promised to pay BCD all outstanding amounts due and owing, including the Retainage and the December Draw, if BCD agreed to complete the Hotel and obtain the Temporary Certificate of Occupancy.⁸⁶ The record is clear that Mr. Rodrigues made his promise with full knowledge of all issues with the Loan and Hotel. As such, even if Crown could show that BCD knowingly made false statements to induce Crown into action that it otherwise would not have engaged in (which BCD did not do), the Superior Court

⁸³ JX954 at A258; JX228 at B28.

⁸⁴ JX954 at A258; JX228 at B28. The Court noted that the Draw Request process was addressed at length by the Court in Loan Trial, but ignored by Crown in this trial. A1509.

⁸⁵ JX894 at B120; JX631 at A201; JX633 at A202; JX939 at B122; JX441 at B31-B33; JX531 at B36-B37; JX567 at B38-B50.

⁸⁶ 8/16/21 Tr. at A419:10-16; 8/17/21 Tr. at A579:14-20 (Deignan); 8/18/21 Tr. at A890:9-A891:7 (Patel).

found that Crown did not show justifiable reliance on any particular statement that allegedly was fraudulent.

Notwithstanding the Court's findings, which are firmly grounded in the trial record, Crown argues that its fraud and conspiracy claims are amply supported by the evidence presented at trial. In large measure, Crown supports its argument on the flawed belief that the contingency report prepared by Mr. Crumlish, which was used to track all project costs, including the separately funded FF&E costs, is evidence of fraud and conspiracy to hide material information from Crown. But the Superior Court found that Crown's view of the alleged fraud and conspiracy evidence, including the contingency report, is largely based on innuendo and unsupported conclusions. For example, Crown argued that BCD falsely represented the nature of Payment Applications until the end of the Project, at which time it then submitted further change orders for extra work to Crown. But as Crown is forced to acknowledge in its opening Brief, and as the Superior Court recognized in its opinion, Crown had its own on-site representative at the Project, Mr. Mirandi, who reviewed and approved each monthly invoice submitted by BCD. Based on these reviews and pre-payment consultations, Crown knew the specific work that BCD was performing, and what BCD was charging MRPC and Crown for that work.⁸⁷

⁸⁷ JX954 at A258; JX228 at B28.

Curiously, Crown never offered Mr. Mirandi as a witness in the Trial, although Mr. Mirandi did testify in the Loan Trial, where the Superior Court found his testimony to be credible. Instead, Crown only offered Mr. Madigan to support the fraud and conspiracy claims. Mr. Madigan prepared a report dated January 12, 2020 (the “Report”) and testified at trial about his Report and conclusions. His testimony essentially can be distilled to the following: BCD entered into a construction contract with MRPC “with knowledge” that the fixed price contract amount was inadequate to see the Project through to completion; BCD and MRPC worked together to conceal change order costs from Crown; BCD submitted pay applications for completed work to MRPC and Crown that were misleading; BCD incurred less than \$50,000 of additional project costs after an onsite meeting on December 21, 2014; and BCD failed to manage the Project competently which resulted in excessive cost and schedule overruns.⁸⁸

While the Court found Mr. Madigan to be credible, it also found that he was not helpful about the issues presented to the Court. For example, the Court stated that Mr. Madigan’s testimony was conclusory and did not account for prior testimony in the Loan Trial relating to the Hotel or BCD’s performance. As such, the Court was left to wonder why the work of Mr. Mirandi or the independent architect was not factored into Mr. Madigan’s conclusions. Further, the trial record

⁸⁸ JX954 at A1479.

also reflects that Mr. Madigan failed to review deposition transcripts, did not speak to anyone from Crown, including Mr. Mirandi, and failed to analyze whether any change orders were improperly billed.⁸⁹

The Superior Court also found that Crown was involved during the Project in negotiations with MRPC and BCD over the various loan modifications and that it reviewed and approved the Draw Requests and work completion. In fact, as the Superior Court points out, Crown never lent more than the original Loan amount (\$12,988,000.00). The Superior Court adds that in reality the Hotel was completed to the satisfaction of all including, among others, the franchisor and the independent architect, and that it began functioning as a fully operational hotel once the Certificate of Occupancy was obtained by BCD. The Superior Court found that Mr. Madigan stretched too few facts to come to his conclusions.

Despite these clear findings of fact, Crown argues that there is “ample evidence” to reverse the judgment of the Superior Court. Again, it cites the contingency report as evidence of fraud and conspiracy. But this “ample evidence” is based largely on the same set of facts that Mr. Madigan testified to, including the contingency report, and the same set of facts that the Superior Court found inadequate to prove a fraud and conspiracy claim. Accordingly, because there is no basis to conclude that the Trial Court abused its discretion and clearly erred in

⁸⁹ 8/18/2021 Tr. at A855:8-A856:12; A869:12-16 (Madigan).

finding against Crown on these two claims, there is similarly no basis to reverse the judgment of the Superior Court.

It also should be noted that the mere submission of change orders at the conclusion of a construction project is not evidence of fraud, nor is that act alone an actionable misrepresentation of prior monthly invoices. Indeed, once Crown received those change orders it was free to accept or reject them. But as the trial record reflects, Crown chose to accept them for a very simple self-interested reason - - it wanted BCD to finish the Hotel and obtain the TCO and the Certificate of Occupancy. As the Superior Court points out, when Crown got what it wanted, it reneged on the agreement to pay all sums due, which included the change orders that Crown now argues were fraudulently submitted. Yet, Crown would have it both ways: on the one hand it seeks to avoid paying for change order work at the completion of the Hotel Project by claiming fraud; and on the other hand, it seeks to retain the benefit it obtained by agreeing to pay BCD for all work, including the change order work, for a fully completed and operational Hotel. As the Superior Court stated “[i]f Crown was defrauded, Crown did so willingly.”

Further, Crown does not even argue, let alone prove, that BCD affirmatively and expressly represented in the monthly invoices that it would not submit change orders for the extra work it performed, which largely were necessitated by the Sprinkler Incident that occurred prior to the start of the Project. In fact, the Superior

Court specifically found that Crown knew that the Sprinkler Incident would require time and funding and that the parties would address the issues, if necessary, closer to completion.⁹⁰ These findings by the Superior Court obviate any assertion by Crown that BCD somehow deceived Crown into the belief that the Project would not cost the full Loan Amount.

The reality is that Crown's fraud and conspiracy claims were never legitimate or grounded in a good faith belief that it was deceived. Notably, Crown did not assert fraud or civil conspiracy in the twenty-one counterclaims it asserted in the Loan Trial; instead, Crown first asserted fraud in its Amended Answer and Counterclaims only after BCD rightfully amended its Complaint. The claims were alleged, as is all too common, as a retaliatory measure either to intimidate the plaintiff or drive up the cost of litigation to encourage capitulation.

⁹⁰ JX199 at B24-B25.

V. CONCLUSION

For the reasons set forth above, BCD respectfully asserts that the Superior Court (1) properly dismissed Crown's breach of contract counterclaims; (2) properly found that BCD was a third-party beneficiary of the CLA and that Crown breached its contractual obligation to BCD; and (3) properly determined that Crown did not present sufficient evidence proving its counterclaims for fraud and civil conspiracy. Therefore, Crown's appeal must be dismissed, and the Superior Court's findings should be upheld.

Respectfully Submitted,

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