



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

[CORRECTED] APPELLANT CROWN BANK'S REPLY
BRIEF ON APPEAL

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ARGUMENT

I. BCD URGES THE COURT TO REPEAT THE SUPERIOR COURT'S FUNDAMENTAL ERROR OF IGNORING THE RULE 12(b)(6) STANDARD AND MISAPPREHENDS OR IGNORES CROWN'S POINTS OF ERROR.

BCD's Answering Brief fails to address meaningfully the bases of Crown's arguments on appeal. Rather, it: (1) ignores one of Crown's primary points; (2) misapprehends Crown's fraudulent concealment argument; and (3) relies on factual assertions contrary to those alleged in Crown's Counterclaim which cannot be considered on a Rule 12 record. Unable to justify the Superior Court's order dismissing Crown's Counterclaim, BCD simply seems to argue that it would likely have prevailed on the breach of contract claims against it at trial and that dismissal was, therefore, appropriate. But that, of course, is not a proper analysis of this appeal.

The Superior Court dismissed Crown's Counterclaim under Rule 12(b)(6). It did so in error by not accepting as true the facts properly pleaded in detail over 113 paragraphs. It did so in error by not drawing all reasonable inferences in Crown's favor. It did so in error by not finding that the statute of limitations had been tolled by BCD's acts of fraudulent concealment. And it did so in error by failing to apply the relation back doctrine in Crown's favor as it had applied it in BCD's favor

regarding its own Amended Complaint. Accordingly, Crown respectfully submits that the Court should reverse the Superior Court's dismissal of Crown's Counterclaim.

- A. BCD fails even to address the fact that the Superior Court did not apply the relation back doctrine consistently.

Crown's Opening Brief on Appeal plainly argued that the Superior Court erred when it permitted BCD to amend its complaint to add time-barred claims under the relation back doctrine, but refused to apply that doctrine to the counterclaims that Crown sought to assert in response to and on the basis of BCD's new claims and allegations.¹ While BCD's Answering Brief suggests, without citation to case law, that the relation back doctrine is unavailable to Crown, it fails to account for the fact that the Superior Court applied the doctrine with respect to BCD's newly-asserted causes of action in its Amended Complaint, but refused to do so with respect to Crown's Counterclaim. Indeed, the Superior Court's ruling is unclear on the Court's reasoning for that surprising and uneven result.

BCD attempts to justify the outcome by arguing that "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

¹ See Opening Brief at 22–23.

BCD based on fraud.”^{2,3} But BCD makes that statement immediately after arguing the opposite proposition that Crown could have plead its Counterclaims in its original answer. Under BCD’s own reasoning, either the Counterclaims relate back or they are new and related only to the new claims asserted in the Amended Complaint. Both cannot be true. Since one of them must be true under BCD’s logic, the Counterclaims were not time-barred.

Moreover, if the relation back doctrine applied to BCD’s Amended Complaint, it must necessarily have applied to Crown’s Counterclaim that arose from the same facts and transactions and BCD’s newly asserted claims. Either the Superior Court erred when it allowed BCD to proceed with its Amended Complaint or it erred when it did not allow Crown to proceed with its Counterclaims. BCD has no response to this argument. Crown, therefore, respectfully submits that its Counterclaim should not have been dismissed and the Superior Court’s decision should be reversed.

B. The statute of limitations on Crown’s Counterclaims was tolled.

Even if the Counterclaim does not relate back to Crown’s original answer,

² See Answering Brief at 22.

³ Of course, the Counterclaims at issue here are for breach of contract, not fraud. BCD misunderstands Crown’s argument. Crown does not argue that “BCD’s alleged fraudulent conduct is the basis of its breach of contract counterclaims.” See Answering Brief at 23. Rather, it is BCD’s fraudulent concealment of its breaches of contract that serves to toll the statute of limitations as explained below.

those claims were not time-barred, because the statute of limitations was tolled. BCD amended its complaint to add new claims and new factual allegations stemming from the trial in the MRPC Case. Of course, BCD was not a party to the MRPC Case and did not participate in that trial. The facts of that case, however, overlapped to some degree with those in this case.

In response to the Amended Complaint's new factual allegations and new causes of action, Crown asserted its Counterclaim based on those newly-presented facts. Included in the Counterclaim was a comprehensive rendition of factual allegations that established that BCD engaged in fraudulent concealment of its conduct that prevented Crown from discovering that BCD had breached the relevant contracts. The Counterclaim fully supported its breach of contract claims with facts that established each element of its causes of action.

Rather than accepting Crown's factual allegations as true as Rule 12 requires, the Superior Court expressed its doubts that Crown could prove those facts at trial and accordingly dismissed the breach of contract claims. The Superior Court did not accept Crown's factual allegations regarding BCD's fraudulent concealment as true. And the Superior Court did not draw all reasonable inferences in Crown's favor. Its dismissal of the Counterclaim was therefore erroneous as a matter of law.

In an effort to support the Superior Court's conclusion, BCD simply makes the same mistake that the Court did. BCD tells a story that differs factually from the

factual allegations contained in the Counterclaim and argues that Crown must have known the facts that BCD is accused of concealing.⁴ But that exercise just compounds the error that is under review. Rule 12(b)(6) indisputably prohibits the sort of point/counterpoint debate in which BCD asks this Court to engage.

Crown's Counterclaim presents a set of facts that demonstrates BCD's fraudulent concealment of its breaches of contract. Those facts must be accepted as true. If they are disputed, then discovery and a trial will resolve the dispute. But Rule 12(b)(6) is not the proper tool to adjudicate the merits of Crown's Counterclaim. The Superior Court's decision should, therefore, be reversed.

C. BCD relies on factual assertions not contained in the Counterclaim.

BCD's reliance upon facts not in the Rule 12 record is not limited to the fraudulent concealment issue. BCD also submits that the outcome in the MRPC Case absolves it of any liability for its breaches of contract. The MRPC Case, however, involved Crown and its borrower, MRPC Christiana, LLC. BCD was not a party to the case and its conduct was not squarely at issue. Crown did not assert a breach of contract claim against BCD in the MRPC Case, nor could it have. Accordingly, Crown's Counterclaim could not have been already adjudicated. Indeed, it cannot be said to have been litigated, since BCD's conduct was not fully revealed until the MRPC Case was tried, hence the filing of the Counterclaim only

⁴ See Answering Brief at 20–21.

after that trial and in response to BCD's Amended Complaint.

Once again, though, BCD usurps the Court's province by suggesting that, contrary to the facts alleged in Crown's Counterclaim, BCD performed all its contractual obligations and should therefore be found to prevail in this case. Were it so simple. Crown amply supported its breach of contract claims with well-pleaded facts. BCD asks the Court to ignore those facts, skip the discovery process, dispense with trial and quickly decide in its favor. All on the basis of a single paragraph in its Answering Brief.⁵

Of course, neither this Court nor the Superior Court may do that. The standard to be applied is found in Rule 12(b)(6) and the Superior Court did not apply it properly. BCD urges this Court to make the same mistake. Crown respectfully requests that the Court decline to do so.

And since the breach of contract claims against BCD were never litigated, they could not have been properly determined. The collateral estoppel doctrine is, therefore, unavailing to BCD.⁶ Crown respectfully submits that the Superior Court's dismissal of Crown's Counterclaim for BCD's breaches of the two contracts is contrary to Delaware law. BCD's arguments either fail to address the salient points

⁵ See Answering Brief at 22–23.

⁶ *Messick v. Star Enterprises*, 655 A.2d 1209 (Del. 1995).

of error that Crown has identified or simply makes the same fundamental mistake of introducing facts outside the appropriate record that the Superior Court made. Therefore, the Superior Court's judgment should be reversed.

II. THE SUPERIOR COURT INCORRECTLY APPLIED NEW JERSEY LAW REGARDING THE THIRD PARTY BENEFICIARY DOCTRINE.

BCD accepts the statutory and case law that establishes New Jersey's version of the third party beneficiary doctrine. But, like the Superior Court, BCD misapplies that law and asks this Court to do likewise.

When determining whether BCD was a third party beneficiary under Crown's contracts with its borrower, MRPC, the Superior Court was required to give effect to the parties' stated and agreed upon wishes, even where the parties' conduct could be construed otherwise.⁷ The Superior Court did not do that and instead accorded insufficient weight to the plain, negotiated and bargained-for language contained in the contracts. That language was wholly consistent and unambiguous and the parties' conduct conformed to it.

The Superior Court, however, engaged in an exercise nowhere sanctioned by New Jersey law. The Court disregarded the parties' express agreement that there would be no third party beneficiaries of the agreement even though the same agreement provides that payments could be made by Crown directly to BCD. That is, the parties provided for the efficiency of direct payment while also making clear that neither BCD nor anyone else would have the status of a third party beneficiary. The Superior Court swept that bargained-for arrangement aside and replace it with the Court's own arrangement,

⁷ *Stone & Magnanini, LLP v. United Airlines*, 2021 WL 278365 at *5 (N.J. Super. App. Div. Jan. 28, 2021).

whereby BCD took on rights that it was never meant to enjoy.

Crown has cited five New Jersey cases that apply the relevant rules consistently and appropriately. In response, BCD argues that three of cases are distinguishable, because they arise from different factual scenarios. But BCD does not explain how the factual settings of those cases make any difference to the application of the underlying rules. Where parties plainly express their intent to negate third party beneficiary rights, those negations are upheld in New Jersey. That rule is the same across all manner of commercial activities, no matter the nature of the contract or the industry involved.

Of particular importance is the fact that New Jersey courts hold that in the construction contract context, sequential chains of payment do not afford payment recipients third party beneficiary rights.⁸ BCD cites that decision as supporting the Superior Court's decision, but its rule establishes that the Superior Court deviated from New Jersey law by countermanding the parties' clearly expressed intent to negate all third party beneficiary rights.

Another New Jersey decision, *Hiller & Skoglund, Inc. v. Atl. Creosoting Co.*, 190 A.2d 380 (N.J. 1963), stands for a like proposition. BCD does not address that decision from New Jersey's highest court and can offer no basis for this Court to ignore it also.

New Jersey law allows for a factual inquiry to determine whether an actor enjoys third party beneficiary rights. But where, as here, the contract parties have clearly

⁸ *Insulation Contractor & Supply v. Kravco, Inc.*, 507 A.2d 754 (N.J. Super. App. Div. 1986).

expressed their intention to negate third party beneficiary rights, the inquiry is over. This is especially true in the construction context with sequential payment arrangements, just as the contracts in this case provided.

The Superior Court should have accepted and enforced the parties' unambiguous contractual provisions. When the Court failed to do so by granting BCD rights that the parties expressly negated, the Court erred as a matter of law. Accordingly, Crown respectfully submits that the Superior Court's judgment should be reversed.

III. BCD MISINTERPETS DELAWARE LAW AND IGNORES EVIDENCE ESTABLISHING THAT THE SUPERIOR COURT WAS CLEARLY WRONG WHEN IT DID NOT FIND JUSTIFIABLE RELIANCE BY CROWN.

A. Crown sets forth the correct standard of review.

BCD asserts that Crown does not set forth a correct standard of review for the finding of the Superior Court that Crown's reliance on BCD's misrepresentations was not justified. BCD argues that *Levin v. Smith*, 513 A.3d 1292 (Del. 1986), actually provides guidance for circumstances in which this Court should enhance its deference to the trial court. This interpretation is not supported by a plain reading of *Levin v. Smith*. Contrary to BCD's assertion, *Levin v. Smith* clarified that this Court has the authority to review the record and find that the trial court was "clearly wrong."⁹ Accordingly, this Court may review the record and find that the trial court was clearly wrong when it found that Crown did not prove justifiable reliance.

B. Crown's fraud claim is not improperly bootstrapped to its breach of contract claim because its breach of contract claim has been dismissed.

BCD next argues that Crown's fraud claim must fail because it is impermissible to bootstrap a fraud claim to a breach of contract claim. However, there is no viable breach of contract claim to which Crown can bootstrap its fraud claim, and therefore, BCD's argument must fail. The Chancery Court in *Pilot Air Freight, LLC v. Manna Freight Systems, Inc.*, 2020 WL 5588671 (Del. Ch. September 18, 2020) analyzed a

⁹*Levin v. Smith*, 513 A.3d 1292, 1301 (Del. 1986).

similar attack on plaintiff's fraud claim on grounds the fraud claim was nothing more than a bootstrapped breach of contract claim. The plaintiff had asserted claims for, among others, breach of contract and fraud. The court dismissed the breach of contract claims relating to the fraud claim. The court then turned to the defendant's motion to dismiss the fraud claim on grounds the fraud claim was improper bootstrapping. The Chancery Court noted that although "it has become customary" for defendants to attack fraud claims as bootstrapped breach of contract claims¹⁰, there are four clear instances when bootstrapping does not occur.¹¹ One of these four instances is where "... there is no [breach of contract] claim on which to 'bootstrap' the fraud claim."¹² Finding that "no breach of contract claim implicated by the fraud claim has survived dismissal," the Chancery Court concluded that there was "therefore, no claim to which the fraud claims can be bootstrapped."¹³

BCD argues that "as [Crown's] breach of contract counterclaims were properly dismissed, Crown cannot now attempt to recover the same damages in a fraud claim where the basis of the fraud claim was an alleged breach of contractual duties."¹⁴ BCD's conclusion is patently incorrect. Indeed, because Crown's breach of contract

¹⁰ *Pilot Air Freight, LLC v. Manna Freight Systems, Inc.*, 2020 WL 5588671, *25 (Del. Ch. September 18, 2020).

¹¹ *Id.* at *26.

¹² *Id.*

¹³ *Id.*

¹⁴ *See* Answering Brief at 34.

counterclaims were dismissed, there is no breach of contract counterclaim to which Crown can now bootstrap its fraud claim. Moreover, Crown's fraud counterclaim alleges separate and distinct facts from its dismissed breach of contract counterclaims. Specifically, the fraud counterclaim details BCD's false representations, knowledge of the statements' falsity, intent to induce Crown, and Crown's justifiable reliance and damages that are not alleged in its breach of contract counterclaims.¹⁵ As a result, Crown's fraud counterclaim is permissible as a matter of law.

C. The record supports that the Superior Court's finding that Crown did not justifiably rely on BCD's misrepresentations is clearly wrong.

Crown established at trial all of the elements to prove a fraud claim: BCD submitted four Payment Applications that falsely understated the Construction Agreement sum (the false representation); at the time that it did so, BCD knew that the statements were false (knowledge of falsity); BCD submitted the false Payment Applications to induce Crown to disburse the Loan funds (intent to induce the plaintiff to act); Crown justifiably relied on the Payment Applications because they appeared to be in conformance with the original Construction Agreement (justifiable reliance upon the representation); and Crown disbursed funds for work it did not agree to for a project that exceeded the budget by over \$2,000,000 (damages).

In support of its argument that the Superior Court correctly found that Crown

¹⁵ See Crown's Answer to the Amended Complaint, July 12, 2018, at A1078–A1190 and Amended Counterclaim, November 26, 2018, attached hereto as Exhibit "A."

did not justifiably rely on BCD's misrepresentations, BCD lists the evidence the Superior Court considered when it found that Crown's reliance on BCD's misrepresentations was not justified. This list includes, among others, that Crown was a very active participant in the events of the Hotel project, retained Mr. Mirandi to review the work and oversaw the Draw Request process.¹⁶ As set forth in Crown's Opening Brief, the evidence presented to the trial court underscores that Crown was intent on ensuring that the project stayed on schedule and on budget.

It is difficult to reconcile the conclusion that Crown was willingly defrauded by BCD¹⁷ with the affirmative steps Crown took to avoid that very fate, including, as BCD notes, hiring Mr. Mirandi to make site regular site visits and closely monitor the Draw Request process.¹⁸ To the contrary, and discussed at length in Crown's Opening Brief, Delaware courts have viewed such diligence as evidence that the plaintiff justifiably relied on the defendant's misrepresentations because it took efforts to verify the defendant's statements and had no reason to doubt their truth.¹⁹ In the instant case, the efforts that Crown undertook to monitor the project—from hiring a site supervisor to evaluating each Draw Request—contradict the finding that Crown was willingly duped.

¹⁶ See Answering Brief at 34.

¹⁷ Answering Brief at 39.

¹⁸ See Answering Brief at 38.

¹⁹ See *Great Hill Equity Partners IV, LP v SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829 (Del. Ch. Dec. 3, 2018), at *3; Opening Brief at 33.

In a similar vein, BCD takes great pains in its Answering Brief to argue that the “mere submission” of change orders is not evidence of fraud and that BCD never represented that it would not present change orders at the end of the project.²⁰ Crown does not argue that submitting change orders in and of itself constitutes fraudulent conduct. What is fraudulent, however, and what BCD does not address in its Answering Brief, is the scheme BCD and MRPC developed to intentionally manipulate the payment applications so Transferred Costs would float other change orders to hide increases in the project’s cost from Crown until the end of the project.²¹ Because BCD completely ignores this scheme²², it does not answer the crucial question of why BCD and MRPC would undertake such an elaborate shell game if Crown truly had, as BCD maintains, “full knowledge of all issues with the Loan and Hotel.”²³

The only reasonable conclusion is that Crown did not have full knowledge of all of the issues with the Loan and the Hotel, and BCD and MRPC conspired to engage in a fraudulent scheme to keep it that way. The Superior Court was clearly wrong when it found that Crown did not justifiably rely on BCD’s misrepresentations, and its finding on the fraud counterclaim should be reversed.

²⁰ See Answering Brief at 39.

²¹ See Opening Brief at 10–11.

²² This scheme is set out in the e-mail from BCD’s Field Operations Manager, Kevin Crumlish, on June 11, 2014. See Opening Brief at 10.

²³ See Answering Brief at 35.

CONCLUSION

The Superior Court erred when it dismissed Crown's counterclaims for breach of contract at the Rule 12 stage and Crown respectfully requests that the Court reverse that decision and remand this case for further proceedings. The Superior Court also erred when it misapplied New Jersey law with respect to its third party beneficiary findings. That error should be reversed and corrected on remand. Finally, the Superior Court's rejection of Crown's fraud and conspiracy claims is contradicted by clear documentary and corroborating testimonial evidence and should be reversed.

Respectfully submitted,

Dated: November 7, 2022

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