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POHATCONG CREEK SOLAR, LLC, Plaintiff, v. VASILIOS KARABATSOS and FRANKLIN SOLAR W3-077, LLC and JOHN DOES 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION Docket No. MON-L-137-20 (CBLP) <u>Civil Action</u> **OPINION**
FRANKLIN SOLAR W3-077, LLC and VASILIOS KARABATSOS, Individually, Plaintiffs, v. GIORDANO, HALLERAN & CIESLA, P.C., POHATCONG CREEK SOLAR, LLC, CEP SOLAR LIMITED and NJR CLEAN ENERGY VENTURES III CORPORATION, Defendants.	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY CHANCERY DIVISION DOCKET NO. BUR-C-27-20
Franklin Solar w3-077, LLC Plaintiff, v. CEP SOLAR LIMITED, Defendant.	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION DOCKET NO. BUR-L-980-20

Argued: October 5, 2020
Decided: October 29, 2020

Sean F. Byrnes, Esq., Byrnes, O'Hern & Heugle, LLC, attorney for plaintiff, Pohatcong Creek Solar.

Gracy Hulse, Esq., Hulse & Wynter, attorney for defendants, Franklin Solar and Vasilios Karabatsos.

Lisa S. Bonsall, Esq., McCarter & English, attorney for defendant, NJR Clean Energy Ventures III Corporation

Paul E. Minnefor, Esq., Giordano, Halleran & Ciesla, P.C., attorney for defendant and escrow agent, Giordano, Halleran & Ciesla, P.C.

HONORABLE MARA ZAZZALI-HOGAN, J.S.C.

This dispute arises out of an Asset Purchase and Sale Agreement ("APSA") entered into on September 24, 2018, by Buyer Plaintiff Pohatcong Creek Solar, LLC ("Creek"), Defendant CEP Solar Limited ("CEP") and Seller Defendant Franklin Solar 3-077, LLC. The APSA relates to a grid supply, solar farm in Franklin Township intended to sell generated power into the distribution system. Afterwards, Creek sold those rights to NJR Clean Energy Ventures III ("NJR") by way of an Asset Purchase Agreement (the "APA") executed on July 29, 2019. As part of that transaction, some of the purchase price was to be paid into escrow with the escrow agent, Giordano, Halleran and Ciesla, P.C. (the "Giordano Firm"). Under the terms of the Escrow Agreement, which was signed by Creek, Franklin Solar, CEP and NJR, the Giordano Firm could deposit the funds into Court in the event of a dispute. To say that a dispute has ensued is an understatement.

Here, the Franklin Defendants have filed three motions seeking: (1) dismissal of inidividual Defendant Vasilios Karabatsos, who executed the agreement on behalf of

Franklin Solar, (2) a more definite statement, in part because the fraud claims require a heightened pleading pursuant to R.4:5-8(a) and (3) dismissal of claims for Plaintiff's request for injunctive relief, which sought an order barring distribution of the $1.5 million related to the transfer of the assets to NJR. After the court scheduled oral argument, the Franklin Defendants withdrew the motion to dismiss Karabatsos individually. Meanwhile on September 30, 2010, the court granted the Giordano Firm's Motion to Deposit the $1.5 million arising out of the Franklin Solar/NJR APSA, which the Franklin Defendants and NJR opposed, and denied the Franklin Defendants' Cross Motion to bar Creek from objecting to the release of the $1.5 funds to the Franklin Defendants, which was joined by NJR.

I. Procedural History

To put things in context, a brief recitation of the procedural history is warranted. Creek filed the Complaint in this matter on January 10, 2020 alleging legal fraud, negligent misrepresentation and breach of implied covenants of good faith and fair dealing. After filling a Motion to Dismiss Karabatsos on February 19, 2020, the Karabatsos Defendants filed a separate action against the Giordano Firm, Creek, CEP and NJR in Burlington County (Docket No. BUR-C-27-20). Franklin Solar filed a third action against CEP Solar Limited in a different part of the Burlington County vicinage. (Docket No. BUR-L-980-20). Thereafter, the Giordano Firm filed an Order to Show Cause in the Monmouth County Law Division seeking to deposit the funds in the court, and that request was denied for procedural reasons. The three remaining matters were consolidated by order dated June 11, 2020 under this docket MON-L-137-20 as part of the Complex Business Litigation Program

II. Motion for a More Definite Statement/ for Particularity

In their motion to compel a more definitive statement, the Franklin Defendants contend that they do not know which of the "many claims" of falsehood or deceit Plaintiff relies on as support for its claims of legal fraud and negligent misrepresentation. In addition to claiming that Creek pleads "general and conclusory allegations," the Franklin Defendants claim they are confused by statements that Karabatsos "had an extensive history with the Project and he was fully aware that the property was not secured by a lease or contract." Franklin cites to paragraphs 103-106, 119-25, 35, 37, 38, 42, 44, 48, 49, 50, and 52 as being particularly defective.

After noting that such motions should be reserved for extreme cases that make it impossible for the defendant to form a responsive pleading, Creek responds that it has provided exact quotations, descriptions of what was misrepresented, the impact of those misrepresentations had and the steps Creek took to save the solar project despite those misrepresentations. Thereafter, Plaintiff cites to and explains how each paragraph of the complaint has met the heightened pleading standard.

In their Reply, the Franklin Defendants contend that Creek's Opposition does actually provide details that a heightened pleading standard require. Specifically, the Franklin Defendants assert as follows:

> without admitting he has done so, counsel for Plaintiff has effectively satisfied Defendants' motion by his detailed description of Plaintiff's allegations of fraud and misrepresentation …There, Plaintiff's counsel sets out five specific allegations of misrepresentation: (1) whether the project was virtually "turnkey" and ready to be sold to a larger developer; (2) the status of the "Banghart Easement"; (3) the necessity and status of wetlands review; (4) the status of engineering design work; and (5) the status of the PJM application.

As a threshold issue, the Franklin Defendants appear to conflate a Motion for a More Definite Statement pursuant to R. 4:6-4(a) with a Motion pursuant to R. 4:5-8(a), which requires a plaintiff to plead a fraud claim with particularity. Compare Memorandum of Law at 13 (referring to motion for a "more definite statement") with Memorandum of Law at 4-6 (referring to pleading with fraud with particularity under the heightened pleading standard). Each will be addressed separately.

A. Rule 4:5-4(a)

Rule 4:6-4(a) provides that if a "responsive pleading is to be made to a pleading which is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definitive statement before interposing a responsive pleading. The motion shall point out the defects complained of and details desired." New Jersey courts have made clear, however, that such motion should only be required in extreme cases where the defendants cannot reasonably be expected to frame a responsive pleading. Volutube Corp. v. B. & C. Insulation Prods., Inc., 20 N.J. Super. 250, 255-56 (Super. Ct. 1951). Meanwhile, R. 4:62-8(a) states that when alleging "misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge and other conditions of mind of a person may be alleged generally." (Emphasis added).

Here, it appears that the Franklin Defendants first seek a more definite statement because they do not like how the pleading was framed. As part of their argument, the Franklin Defendants dissect numerous paragraphs of the Complaint and then, in some instances, argue the substance of the claim. For example, they contend that paragraph

31 is confusing and "ignores that neither a lease [n]or contract for the property was listed in the PSA as an asset being sold by Franklin and, in fact, Plaintiff had already secured a lease for the property prior to the Effective Date of the APSA." They also contend that the allegation in paragraph 50 is an admission and undercuts paragraph 106. Later, they contend that Creek did not correctly catalogue the "project Assets."

Likewise, the Franklin Defendants criticize allegations regarding the Banghart Easement in Count One, which clearly enumerates specific concerns about what that easement represented, why it was crucial to the development and how it would have saved time and expenses. The Franklin Defendants also disagree with Plaintiff's contention that its decision to enter into the APSA was "based upon representations of Karabatsos that the engineering documents for the Project were far along in the process, and the approval process was near completion."

The court finds that the pleadings are sufficiently clear and therefore, do not require a more definitive statement. If there was any doubt, and the court does not believe that there was, it was resolved by the Franklin Defendants' response to Plaintiff's Opposition where the latter stated that "[h]appily, this [information in the Opposition] is exactly the sort of clarity that Franklin's motion seeks," even though those details were contained in the pleading.[1] In light of the foregoing, the Franklin Defendants have "clarity" on what has been alleged against them even if the wording of the pleading is not

[1] Equally confusing is the Franklin Defendants' comment that because the pleadings are now clear, that "Now, all that needs to be done is for Mr. Byrnes'' writings to be placed either in a formal Amendment to the Complaint or a Stipulation which will be admissible in a Motion for Summary Judgment under R. 4:46-2© or other motions or proceedings. I have taken the liberty of drafting such an Amendment so the Court and counsel can see what I am envisioning."

precisely how they would like it to be articulated because the Complaint is sufficiently detailed.

B. Rule 4:5-8

Next, after critiquing the pleadings, the Franklin Defendants allege that "the ... problem with Plaintiff's accusatory pleading is that it does not meet the heightened pleading requirements for claims of fraud and misrepresentation contained in R. 4:5-8(a) and, as a result, Defendants do not know which of the many claims of falsehood or deceit Plaintiff relies on as support for its claims of legal fraud and negligent misrepresentation."

A simple review of the Complaint, however, demonstrates that it was pled with the required specificity despite the Franklin Defendants' assertion to the contrary. See, e.g., paragraphs 35-38 (expanding on the turnkey argument); ¶¶ 54-59 and 103 (explaining effect of misrepresentations concerning Banghart Easement); ¶¶ 7-71 and 104 (describing how Franklin Solar Defendants made misrepresentations regarding what was necessary in terms of wetlands review); ¶¶ 74-75 and 105 (enumerating how the Franklin Solar Defendants misrepresented that engineering surveys were completed); and ¶¶ 78 and 106 (stating that Karabatsos failed to advise Plaintiff that an application for certain regulatory approvals from PJM was about to be terminated because of Karabatsos' inactivity).

In this case, the allegations in the Complaint include all of the elements of the common law tort of fraud: a material representation of a presently existing or past fact made with knowledge of its falsity with the intention that the other party relies, justifiable reliance and damage. Jewish Center of Sussex Cty. v. Whale, 86 *N.J.* 619, 624-625 (1981); Nappe v. Anschelewitz, Barr, Ansell, 189 *N.J. Super.* 347, 354-356

(App.Div.1983). The Complaint is not defective because it alleges that Karabatsos made numerous representations, which are specified in the complaint, knowing that those statements were false. Creek alleges that it justifiably relied on those representations when it entered into the APSA with the Franklin Defendants because they closed on the deal. As for damages, Creek explains that they were forced to spend significantly more time and money to complete the project and paid more for the assets than they were worth.

To be clear, Creek has sufficiently pled fraud with particularity as required under the heightened standard, having filed a 131 paragraph complaint consisting of twenty-eight (28) pages. In opposition to the motion, Creek addresses almost every paragraph of the Complaint and explains its significance. It is troubling how the Franklin Defendants can assert that the pleading is insufficient under the standard. If the Franklin Defendants are confused or doubt the veracity of the allegations, they may use discovery as a tool to clarify any ambiguities and fine tune their defenses. See Volutube Corp., 20 N.J. Super. at 255-56 (Super. Ct. 1951) (denying motion for more definite statement because details concerning what exactly was communicated, to and by whom it was communicated, and the effect on the listener can be obtained through discovery). Therefore, the court **denies** the Franklin Defendants' Motion for a More Definite Statement/for Particularity.

III. Motion to Dismiss Creek's Request for Injunctive Relief

The Franklin Defendants also move to dismiss Plaintiff's claims for a preliminary injunction restraining the Escrow Agent from making payment to Franklin Solar pursuant to the Creek/NJR ASPA. According to the Franklin Defendants, "such nonsensical and frivolous claims and prayers for relief [for compensatory and punitive damages]" should

be dismissed immediately so that "no one is fooled about what this case is about or justifies their conduct upon the inadequate pleading". They also claim that Creek does not meet the standard for an Order to Show Cause pursuant to Crowe v. DiGioia, 90 N.J. 126 (1982) and is procedurally deficient under R. 4:52-1.

In response, Creek advised that it sought injunctive relief to preserve its rights under the Escrow Agreement among Creek, Franklin Solar and NJR. They emphasize that Paragraph 4 of the agreement states that if there is a dispute under the Escrow Agreement, the Escrow Agent has no obligation to pay out the escrowed moneys but instead, can hold such monies and/or file an action with court for leave to deposit those monies into court pending adjudication of the dispute.

At oral argument for this motion on October 5, 2020, both the Franklin Defendants and NJR disagreed with the court's statement that said motion was moot in light of the court's ruling on the Giordano Motion to deposit the funds and Franklin Defendants' Cross Motion regarding disposition of the escrowed funds on September 30, 2020. For purposes of this motion, the first prayer for relief in this action seeks a preliminary injunction restraining the escrow agent "from making any payment toward the Purchase Price under the Purchase and Sale Agreement dated September 24, 2018." Meanwhile, the Burlington County Action, which was ultimately consolidated here, seeks the opposite, namely, the release of those same funds to the Franklin Defendants.

According to the Franklin Defendants, Creek's first request for relief must be adjudicated on the merits because it was filed before the Giordano motion to deposit these funds and Franklin Defendants' Cross Motion to compel the Giordano Firm to turn over the funds to the Franklin Defendants so that so they could perform the obligation of

the contract between Franklin Defendants and NJR, a request that NJR joined. Defendants fail, however, to cite to any authority that requires adjudication of the merits of a motion because it predated another. Regardless of how all these motions were framed, each party wanted the court to compel Giordano to do something with that $1.5 million, although they disagreed where those monies should go. The temporary disposition of those funds was decided in the court's September 30, 2020 Order. The court declines to now assess whether Creek would have met the standard for injunctive relief because it would be duplicative and an inefficient use of resources as a court is not required to dispose of each and every legal theory if its resolution is no longer required because its disposition on another theory results in the same outcome. For the reasons set forth above, the Franklin Defendants' Motion to Dismiss Creek's request for injunctive relief is **denied as moot** because of the Court's September 30, 2020 Order and related oral decision**.**

/s/ MARA ZAZZALI-HOGAN, J.S.C.