PREPARED BY THE COURT

THE ENCLAVE CONDOMINIUM ASSOCIATION, INC.,	:	SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY – LAW DIVISION
Plaintiff,	:	
vs.	:	CIVIL ACTION
ELITE RESTORATION, INC., ET AL.,	:	DOCKET NO: ATL-L-1903-21 (CBLP)
Defendants.	:	**ORDER**

THIS MATTER having come before the court on multiple dispositive motions, and the court having considered the motion papers, the opposition papers, and the arguments of counsel placed on the record on January 17, 2024, and for the reasons set forth in the accompanying Memorandum of Decision,

IT IS on this 14th day of February, 2024 **ORDERED AND ADJUDGED** as follows:

- The Plaintiff's dispositive motion is **GRANTED in part**, and Count 1 of the Counterclaim of Defendant Elite Restoration, Inc. ("Elite") is **DISMISSED WITH PREJUDICE**;

- Elite's dispositive motion is **GRANTED in part**, and Counts 4, 5, 6, 7, 9, and 12 of the Plaintiff's Verified Complaint are **DISMISSED WITH PREJUDICE**; and

- The motion filed on behalf of Defendants Structural Design Associates, Inc and Andrew Scheerer is **DENIED without prejudice**; the court will schedule a hearing pursuant to Rule 104 to determine the admissibility of the testimony of the Plaintiff's expert witness, Richard D. Roberts, P.E. with respect to Count 10 of the Verified Complaint.

IT IS FURTHER ORDERED that this order shall be deemed served on all counsel of record via filing in e-courts.

Sarah Beth Johnson
SARAH BETH JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

SARAH BETH JOHNSON, J.S.C.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: I. Dominic Simeone, Esq.
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William D. Auxer, Esq.
KAPLIN STEWART MELOFF REITER & STEIN, P.C.
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Attorney for Defendants Structural Design Associates and Andrew Scheerer

RE: Enclave Condominium Association, Inc. v Elite Restoration, Inc., et al.

DOCKET NO. ATL-L-1903-21

This is a breach of contract action arising from a construction renovation project at a condominium complex located in Atlantic City, New Jersey. As detailed below, the parties each moved for summary judgment on certain claims asserted by and against them.

The finds the following facts to be undisputed:

Plaintiff Enclave Condominium Association, Inc. ("Enclave") is a condominium association and nonprofit corporation located in Atlantic City, New Jersey. Defendant Elite Restoration, Inc. ("Elite") is a contractor, and Defendant Charles Culbertson III is its president. Defendant Structural Design Associates, Inc. ("SDA") is a structural engineering firm, and its employee, Defendant Andrew Scheerer, P.E., is a professional engineer and land surveyor.

In 2016, Enclave sought to renovate its façade and balconies. Enclave retained SDA to draft the project specifications. SDA sought preliminary bids on two test units, Units 2601 and 2701, to allow potential bidders to assess the nature and scope of the work. In November 2016, Elite submitted a bid for the two units. In January 2017, Enclave retained Elite to complete the renovation work. In February 2017, Elite submitted a bid to be contractor on the larger project for the rest of the units.

In January 2018, Enclave retained SDA to act as its architect and consulting engineer on the balcony project. Elite was found to be the low bidder and was retained for the project in April

2018. SDA prepared the American Institute of Architects (AIA) form agreement between Enclave and Elite, which included terms addressing contract modifications and concealed and unknown conditions. The total contract price was $2,770,224.

Elite began work on the project in the fall of 2018. Elite started by demolishing existing deck coating and realized issues with the pitch of certain balconies. Elite informed SDA of these issues in April 2019, and SDA told Elite to keep track of its time for any additional work.

Over the course of its performance of the contract, Elite submitted several change order requests; only 2 change orders are at issue here:

The first change order re scupper adjustments: In July 2019, Elite submitted a change order request in the amount of $57,321.84 for work done to 4 units. In August 2019, Elite submitted a change order request in the amount of $31,687.60 for work done to 3 additional units.

After receiving the initial change order requests for this work, SDA informed Elite that the price was too high to present to Enclave. SDA recommended that Elite resubmit the change order requests based upon a dollar rate per scupper hole basis instead of a time and material basis, and Elite did so.

In November 2019, SDA submitted to Enclave a change order amounting to $53,969 for modification of 157 existing scuppers and drilling 53 new scuppers. In December 2019, Elite submitted an explanation of the scupper adjustment work to SDA.

Later in December 2019, SDA emailed Elite, informing them that Enclave wanted the change orders consolidated. In January 2020, Elite consolidated the requests for scupper adjustment work for all units, which totaled $524,432.

In March 2020, SDA reduced the proposed change order to $179,000 and submitted it to Enclave. Enclave denied the change order request in June 2020, but Elite had already completed the work.

The second change order re additional sloping work: In August 2019, Elite submitted a change order request in the amount of $213,480 for placing additional sloping material and exceeding the 50% allowance. In October 2019, Enclave rejected this request, noting Elite had not exceeded the allowance.

In June 2020, Elite submitted a change order request for additional balcony deck surfacing and re-sloping work totaling $1,379,950. In August 2020, Enclave again rejected the change order, asserting Elite had not required additional material to do the sloping work. By the time Enclave rejected the change order request, Elite had substantially completed the work.

While the second change order was pending approval, Elite filed a Notice of Unpaid Balance and Right to File Lien ("NUB") with the Clerk of Atlantic County in July 2020, as required under the Construction Lien Law, N.J.S.A. 2A:44A-20, 21. Elite sought payment of the unpaid contract balance – the contract price less payments made and executed amendments, or change orders, to the contract price. See N.J.S.A. 2A:44A-21.

In August 2020, Elite commenced an arbitration action to the American Arbitration Association ("AAA") to establish the value of a construction lien against Enclave, pursuant to N.J.S.A. 2A:44A-7 and -21.

Elite submitted at arbitration their Applications for Payment Nos. 19 and 20, which had "Conditional Waiver and Release Upon Progress Payment" forms attached. Enclave did not make payments for the amount reflected in Applications for Payment Nos. 19 and 20 because of issues with the finished deck sloping material on certain balconies.

After a hearing, the arbitrator set the lien amount at $187,014.53 – the contract price less the corrective work to be performed by Elite. In September 2020, Elite filed a construction lien against Enclave consistent with the arbitration award. In October 2020, Enclave paid Elite the balance and discharged the lien.

Enclave then made two installment payments to Elite for Application for Payment No. 20., one in December 2020 and the other in January 2021. Enclave requested that Elite sign an unconditional waiver and release of liens and claims, but Elite did not sign the unconditional release because of the pending change order requests.

In May 2021, Elite filed second demand for arbitration with the AAA, citing the arbitration clause in the AIA contract. Elite sought to obtain the $1,904,382 it claimed it was due from Enclave in connection with the rejected change orders.

In response, Enclave instituted the instant action by way of Verified Complaint and Order to Show Cause filed on June 18, 2021. Enclave sought to remove the dispute from AAA arbitration. It also asserted breach of contract and violations of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, et seq., against Elite and Culbertson, and it sued SDA and Scheerer for professional malpractice.

On June 23, 2021, the Hon. John C. Porto, P.J.Civ. entered the Order to Show Cause temporarily staying the arbitration proceedings and setting the matter down for hearing. Elite filed responsive pleadings seeking to dismiss Enclave's complaint.

After a hearing, Judge Porto entered an order dated September 23, 2021 denying Elite's motion and entering declaratory judgment in favor of Enclave regarding Elite's arbitration demand. Judge Porto found that the arbitration provisions contained in the AIA contract were unenforceable, and he permanently stayed the AAA arbitration proceedings.

In October 2021, Elite filed an answer and counterclaim seeking approximately $1.9 million in damages for unpaid work performed for Enclave as set forth in the contested change orders. It alleged violations of New Jersey's Prompt Payment Act, N.J.S.A. 1A:30A-1, et seq. ("PPA"), as well as breach of contract and quasi-contract claims.

The matter was assigned to the Complex Business Litigation Program and individually case managed consistent with its guidelines. On November 17, 2023, the parties filed these dispositive applications simultaneously. Oppositions and reply briefs were filed, and the court held oral argument on all pending motions on January 17, 2024. The matter is listed for trial beginning March 4, 2024.

The Motion Standard

Rule 4:46-2 provides that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

In deciding a summary judgment motion, the court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. The thrust of Brill is that "when the evidence 'is so one-sided that one party must prevail as a matter of law,'… the trial court should not hesitate to grant summary judgment." Ibid.

The Parties' Applications

Enclave moves for affirmative summary judgment in its favor under the Consumer Fraud Act ("CFA"), the Home Improvement Practices, and Contractor's Registration Act, which require that any home improvement contract, or change to such a contract, exceeding $500 must be in writing and signed by all parties. N.J.A.C. 13:45A-16.2(a)(12); N.J.S.A. 56:8-138. Enclave asserts that the CFA applies to the contract between it and Elite, and Elite violated the CFA by failing to obtain written, approved change orders before performing work on its residential property.

Enclave submits Elite's technical violation of the CFA establishes liability, and a trial is needed solely to determine the amount of damages owed by Elite. Enclave also asserts Elite intentionally or negligently breached the AIA contract and attempted to "fraudulently" bill Enclave. But Enclave admits it never actually paid any of the purportedly fraudulent invoices.

Additionally, Enclave moves to dismiss Elite's counterclaims under the theory of accord and satisfaction, or the entire controversy doctrine, asserting the September 2020 construction lien arbitration award resolved all payment issues between Enclave and Elite. Alternatively, Enclave seeks dismissal of Elite's claims under the PPA and the asserted contract and quasi-contract theories.

Elite moved for summary judgment in its favor seeking dismissal of the Enclave's CFA claims. Elite argues the CFA does not apply to this transaction, but – even if it did – Enclave cannot establish it has suffered any ascertainable loss as a result of Elite's alleged conduct. Elite also contends that the Enclave's common law fraud and negligence claims are barred by application of the economic loss doctrine, and there is insufficient evidence to support Enclave's breach of contract claims.

Elite also seeks a declaration that its counterclaims are not barred by accord and satisfaction or the entire controversy doctrine and an order precluding Enclave from asserting such defenses at trial. As to its own breach of contract and quasi contract claims, Elite submits there are disputed issues of material fact precluding the entry of summary judgment.

Lastly, SDA moved for summary judgment in its favor seeking the dismissal of Enclave's professional negligence claim. SDA asserts there is no competent evidence establishing SDA breached the standard of care owed to Enclave. It asserts that Enclave's expert witness has failed to adequately address the applicable standard, and SDA's expert opines that it did not breach the standard of care.

In response, Enclave asserts there are credibility issues regarding the experts' opinions precluding the entry of summary judgment, and it requests the court conduct a Rule 104 hearing to determine the admissibility of the expert's testimony at trial.

I shall address the parties' motions in that order.

Analysis

Enclave's Application for Affirmative Relief on Elite's Alleged Violations of the CFA

Enclave seeks the entry of an order declaring (1) the CFA applied to the transaction between Enclave and (2) Elite violated the CFA by performing certain work without a signed change order. Enclave is not entitled to the relief it seeks.

The CFA was enacted to protect consumers from unconscionable commercial practices. N.J.S.A. 56:8-2; see Finderne Mgmt. Co. v Barrett, 402 N.J. Super. 546, 566 (App. Div. 2008). Amendments to the CFA, the Home Improvement Practices regulations and Contractor's Registration Act ("the CRA"), require that any home improvement contract, or change to such a contract, exceeding $500 must be in writing and signed by all parties. N.J.A.C. 13:45A-16.2(a)(12); N.J.S.A. 56:8-138.

To recover under the CFA, a plaintiff must prove (1) unlawful conduct by defendant, (2) an ascertainable loss, and (3) a causal connection between the unlawful conduct and loss. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 24 (1994).

The CFA does not apply to all transactions; it applies to consumer transactions for goods or services typically sold to the public at large. Papergraphics Intern., Inc. v Correa, 389 N.J. Super. 8, 12-13 (App. Div. 2006); All the Way Towing, LLC v. Bucks County Int'l, Inc., 236 N.J. 431, 448 (2019). "CFA applicability hinges on the nature of the transaction," not the identity of the purchaser, and it is determined on a case-by-case basis. Papergraphics, 389 N.J. Super. at 12-13.

The CFA does not apply solely to individual consumers. Corporations may seek redress for violations of the CFA when they are in consumer-oriented situations. Papergraphics, 389 N.J. Super. at 12. However, experienced commercial entities possessing relatively equal bargaining power in negotiated contracts, or having professional guidance in its negotiations through attorneys or other experts, are not the consumers typically contemplated by the CFA. Princeton Healthcare System v. Netsmart New York, Inc., 422 N.J. Super. 467, 473-74 (App. Div. 2011).

In those circumstances, a corporate plaintiff is not an "unsophisticated [party], suffering a disparity of industry knowledge, victimized after being lured into [the] purchase through

fraudulent, deceptive selling or advertising practices" and requiring the protection offered by the CFA. Papergraphics, 389 N.J. Super. at 14.

Applying the undisputed facts of record to this standard, I find that Enclave is not a corporate plaintiff in a consumer-oriented position, and Enclave and Elite are sophisticated parties such that the CFA is inapplicable to the transaction between them. The facts that (a) the AIA agreement may be characterized as a residential improvement contract and (b) Elite is a licensed contractor under the CRA and the Home Improvement Regulations are not dispositive. Rather, I have focused on the relative knowledge, experience, and bargaining power of the parties.

First, it is undisputed that Enclave has been dealing with the issue of water infiltration into its individual condominium units for decades. Court records indicate that, at least as far back as 2002, Enclave has engaged various contractors to perform similar renovation work on the building façade and balconies. See Enclave Condo. Assoc. v. Lime Contracting, Inc., et al. Docket No. ATL-4523-10.

Unfortunately for the association members and unit owners, those water inclusion problems appear to have persisted. They are clearly not "new" problems for Enclave for which the association lacks knowledge or experience. And I take judicial notice of the factual allegations underlying Enclave's earlier lawsuit, which establish its extensive prior involvement with hiring contractors like Elite to fix these ongoing problems.

Second, the record makes clear that Enclave has considerable experience working with Elite. The parties' relationship began in 2016 when Elite submitted the bid for work on the test units, and they continued to deal with each other over the next 5 years – essentially until Enclave filed suit. Their ongoing relationship demonstrates not only Enclave's familiarity with Elite but also its ability to renegotiate and bargain with Elite in the event it was unhappy with the contractor's performance.

Third, Enclave had expert assistance in contracting with Elite and monitoring its performance under the contract. Enclave retained SDA, a professional engineering firm, to assist them with the project, and SDA played a significant role in the completion of the renovation project. SDA also prepared the AIA contract, Enclave was represented by legal counsel in negotiating terms with Elite, and the association president was an attorney. The presence of such professional assistance indicates that Enclave brought a high level of sophistication to the transaction with Elite.

Again, the CFA was enacted to protect vulnerable consumers who may be victimized by a lack of knowledge, experience, or bargaining power. Here, no facts indicate that Enclave was in such a position. To the contrary, Enclave was a knowledgeable, experienced, and sophisticated purchaser of Elite's renovation services. Thus, the CFA does not apply to the transaction underlying the parties' relationship, and Elite's motion for summary judgment as to this issue is denied.

Even if I found the CFA did apply to the AIA contract between Enclave and Elite, Enclave's claims would nonetheless fail for a lack of any evidence establishing an ascertainable loss suffered by Enclave.

As admitted by counsel during oral argument, Enclave never paid any of the allegedly "fraudulent" invoices issued by Elite, and it has not been required to hire a different contractor to repair or alter Elite's renovation work. Enclave's assertion that its employees have spent work time in connection with the litigation has not been demonstrated or quantified in discovery, and Enclave has not presented me with any authority establishing that these litigation-induced "damages" are actually available under the CFA. See e.g., Picogna v. Bd. of Educ. of Cherry Hill, 143 N.J. 391 (1996) (holding that "litigation-induced stress is not recoverable" as an element of damages).

Similarly, any legal fees and costs incurred by Enclave in connection with this action would be compensable if it was the prevailing party under the fee-shifting CFA. Thus, Enclave cannot assert its attorney fees and costs are also compensable damages.

In sum, the facts and law establish Enclave cannot assert CFA claims against Elite or its principal Culbertson. Enclave's motion for a declaratory order in its favor on this issue is denied.

Enclave's Motion for Summary Judgment Dismissal of Elite's Counterclaims Under Accord and Satisfaction or the Entire Controversy Doctrine

Enclave also seeks the dismissal of Elite's counterclaim in its entirety under the theory of accord and satisfaction or the application of the entire controversy doctrine (ECD). Enclave asserts that its payments following the August/September 2020 AAA arbitration resolved all of Elite's claims.

Again, Enclave is not entitled to the relief it seeks.

Because Elite sought to place a lien on Enclave's residential construction project, its 2020 AAA arbitration demand was governed by the Construction Lien Law. N.J.S.A. 2A:44A-1, et seq. Under the statute, "[a]ny contractor … who provides work, services, material, or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed … in accordance with the contract and based upon the contract price …" N.J.S.A. 2A:44A-3(a). A "contract" is defined as "any agreement, or amendment thereto, in writing, evidencing the respective responsibilities of the contracting parties…" N.J.S.A. 2A:44A-2.

An award under this process **does not** preclude subsequent claims:

> Except for the arbitrator's determination itself, any such determination ***shall not be considered final*** in any legal action or proceeding and ***shall not be used for purposes of collateral estoppel, res judicata, or law of the case*** to the extent applicable. Any finding of the arbitrator pursuant to this act shall not be admissible for any purpose in any other action or proceeding.
>
> N.J.S.A. 2A:44A-21(b)(9) (emphasis added).

Under the plain language of the statute, I find that Elite's alleged "failure" to amend the 2020 arbitration claim to include the change orders at issue here does not constitute a waiver of Elite's right to seek subsequent payment from Enclave. Nor does Elite's acceptance of Enclave's

payment of the September 2020 construction lien (and other subsequent payments from Enclave) constitute accord and satisfaction such that Enclave may rely on same as an affirmative defense to Elite's counterclaims.

Essential to the defense of accord and satisfaction are (1) a bona fide dispute as to the amount owed; (2) a clear manifestation of intent by the debtor to the creditor that payment is in satisfaction of the disputed amount; and (3) acceptance of satisfaction by the creditor. Loizeaux Builders Supply Co. v. Donald B. Ludwig Co., 144 N.J. Super. 556, 564-565 (Law Div. 1976). As the disputed change orders were not (and could not be) included in the 2020 AAA arbitration, there is no evidence that Enclave's payment represented a "clear manifestation of intent" by the association to Elite that payment was in satisfaction of the disputed amount related to the change orders. There is also no evidence that Elite accepted the payment as full satisfaction.

The application of the ECD to preclude Elite from pursuing its counterclaim is also unavailable to Enclave based on the record, which establishes this action is the only method in which Elite can assert such claims.

The ECD "embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989) (citation omitted). The New Jersey Supreme Court has stated "[t]he purposes of the doctrine include the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of 'piecemeal decisions.'" Id.

Application of the ECD "requires [the court] to consider fairness to the parties," and "the boundaries of the [ECD] are not limitless." Id. (quoting Oliver v. Ambrose, 152 N.J. 383, 396 (1998)). The court has the sole discretion to apply this "equitable doctrine" based on case-specific considerations. Id.

Here, I find that the undisputed facts indicate that application of the ECD to bar Elite's counterclaim is unwarranted. The 2020 AAA arbitration proceeding was limited to fixing the amount of the construction lien to be placed on the Enclave's property based on the AIA contract. To seek payment on the change orders Enclave refused to approve, Elite filed the second arbitration demand in May 2021 consistent with the terms of the AIA contract.

As Enclave objected to the second AAA arbitration, and Judge Porto found the arbitration provisions in AIA contract unenforceable, Elite was required to seek payment on the change orders by way of a counterclaim to this action filed by Enclave. Because Elite refused to accept the Enclave's 2020 and 2021 payments as full satisfaction of the amount sought on the 2 allegedly outstanding change orders, Elite's prosecution of those claims in connection with this action is consistent with the ECD.

Accordingly, Enclave's motion to dismiss Elite's counterclaims under these affirmative defenses is denied.

Enclave's Remaining Summary Judgment Arguments

Alternatively, Enclave seeks an order dismissing with prejudice Count 1 of Elite's counterclaim for violations of the PPA. Applying the statute to the undisputed facts, I find Enclave is entitled to this relief.

The PPA seeks to ensure that contractors are fully and promptly paid for their work. JHC Indus. Srvs., LLC v. Centurion Companies, Inc., 469 N.J. Super. 306, 309 (App. Div. 2021). It provides that if a contractor has performed consistent with the provisions of a contract and "the billing for the work has been approved and certified by the owner or the owner's authorized approving agent," the owner shall pay the amount due with 30 days of the invoice. N.J.S.A. 2A:30A-2(a).

The statute also provides that "[t]he billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment…" Id. The PPA defines billings as "any period payment, final payment, written approved change order, or request for release of retainage." N.J.S.A. 2A:30A-1.

Because the change orders for which Elite seeks payment were indisputably (1) outside the original AIA contract and (2) rejected by Enclave, I find Elite may not seek relief under the PPA, and Enclave is entitled to the dismissal of that claim.

To the extent Enclave argues it is entitled to dismissal of Elite's remaining breach of contract and quasi-contract claims, the record contains sufficient disputed issues of material fact precluding the entry of summary judgment in favor of Enclave. There are disputes regarding the necessity of the change orders, the scope and value of the work performed under the change orders, the legitimacy of the denial of the change orders, and the representations made among the parties regarding the change orders.

The record contains sufficient proofs for Elite to proceed to trial on these claims. Thus, I will enter summary judgment and dismiss with prejudice only Count 1 of Elite's counterclaim.

Elite's Motion for Summary Judgment Dismissal of Counts 4, 5, 6, 7, 8, 9, and 12 of Enclave's Verified Complaint

Judge Porto's September 23, 2021 order granted judgment in favor of Enclave as to Count 1 of the Verified Complaint. Finding the arbitration provisions in the AIA contract unenforceable, Judge Porto's determination also rendered moot Counts 2, 3, and 11. Count 10 states a cause of action against SDA and Scheerer. Thus, Elite seeks summary judgment in its favor as to the remaining claims in Enclave's Verified Complaint.

As to Counts 4, 5, and 6 alleging violations of the CFA against Elite and Culbertson, I will grant Elite's motion and dismiss those claims for the reasons previously stated. I do not find that the CFA applies to the transaction at issue here.

As to Count 12 seeking "declaratory judgment of accord and satisfaction against Elite," I will grant Elite's motion for the reasons previously stated. The undisputed record and applicable law establish this affirmative defense is not available to Enclave in response to Elite's counterclaim.

As to Counts 7 and 9 for common law fraud and negligence, respectively, I will also grant Elite's motion under the economic loss doctrine (ELD), which precludes claims arising from allegedly tortious conduct that is intrinsic to a contract. Where the alleged tort is essentially a breach of a contractual promise or provision, the injured party's remedy is governed by contract law principles. CPS MedManagement LLC v. Bergen Reg'l Med. Ctr., L.P., 940 F. Supp. 2d 141, 159 (D.N.J. 2013).

In other words, "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). Under the ELD, "courts look to the parties' contract, where it applies, and preclude claims based on extra-contractual purported rights and duties." Namerow v. PediatriCare Assoc., LLC, 461 N.J. Super. 133, 145 (Ch. Div. 2018). The ELD "prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract." Id.; see also Bracco Diagnostics, Inc. v. Brunswig Drug Co., 226 F. Supp. 2d 557, 562 (D.N.J. 2002) ("The [ELD] 'prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract.'") (quoting Duquesne Light Co. v. Westinghouse Elec. Co., 66 F.3d 604, 618 (3d Cir.1995).

The ELD "functions to eliminate recovery on a contract claim in tort claim clothing." G & F Graphic Servs., Inc. v. Graphic Innovators, Inc., 18 F. Supp. 3d 583, 588–89 (D.N.J. 2014). Thus, the ELD will preclude a tort claim unless the plaintiff establishes that the defendant "breached a 'duty owed to the plaintiff that is independent of the duties that arose under the contract[.]'" Id. at 589 (internal citations omitted).

Here, Enclave appears to allege that, because Elite negligently performed the balcony work, it had to do additional work to fix the problem. The change orders reflect the additional costs associated with the (presumably ameliorative) work. Enclave also alleges the change orders contain fraudulently inflated labor costs, which again were at least partially necessary because Elite had to fix (or hide) its prior negligence.

However, Elite's duty to perform the renovation project in a workmanlike manner and accurately bill Enclave for the work performed is intrinsic to the agreement between the parties. Therefore, the ELD precludes the tort claims asserted by Enclave in connection with Elite's alleged misconduct because this conduct, if true, breaches the AIA contract, and Enclave is pursuing that claim as set forth in Count 8 of the Verified Complaint.

Because Enclave has presented no evidence that Elite breached some duty owed independent of the original agreement between the parties, Elite is entitled to summary judgment in its favor and the dismissal with prejudice of the negligence and common law fraud claims. Culbertson, as the principal of Elite, is similarly entitled to dismissal of the common law fraud claim as there is no evidence he has a relationship with Enclave separate from the AIA contract.

As to Count 8, Elite's motion is denied for the reasons previously stated. The record contains multiple disputed issues of material fact regarding the performance of the contract and the change orders precluding the entry of summary judgment as to the contract and quasi-contract claims between the parties.

SDA's Motion for Summary Judgment Dismissal of Enclave's Sole Claim of Malpractice

SDA and Scheerer seek dismissal of Count 10 of the Verified Complaint alleging malpractice. They contend they are entitled to summary judgment because Enclave has provided no admissible, competent evidence of SDA's or Scheerer's professional negligence. They object to the opinion proffered by Richard D. Roberts, P.E. as inadmissible and assert their expert's opinion – finding no breach of the standard of care – constitutes the only competent evidence on this claim.

The New Jersey Rules of Evidence require that experts have a proper bases for their opinions and do not render net opinions. N.J.R.E. 703, 704; Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The net opinion rule provides that "an expert's bare conclusions, unsupported by factual evidence, is inadmissible." Buckelew, 87 N.J. at 524. Rule 104 hearings allow experts to state the basis for their conclusions, explain their methodology, and demonstrate that their methodology is scientifically reliable. Kemp v. State, 174 N.J. 412, 427 (2002).

Here, Roberts' report addresses the entire renovation project and the various aspects of the contract and the specifications created by SDA and Scheerer that contributed to the damages purportedly suffered by Enclave. Enclave submits that Roberts' opinion, when considered with the documents and Scheerer's testimony, "clearly identifies the negligence of SDA/Sheerer." At oral argument, Enclave requested a Rule 104 hearing to determine the full scope of Roberts' relevant and admissible opinion testimony, arguing that deciding summary judgment without a hearing would be premature.

Based on my review of the record, I agree with Enclave. Therefore, I will deny SDA/Scheerer's motion without prejudice and conduct a pre-trial hearing to determine the admissibility of Roberts' testimony regarding the malpractice claim.

Conclusion

The undisputed factual record, combined with the applicable law, establishes there are issues of fact precluding the entry of summary judgment as to Enclave's breach of contract claim and Elite's contract and quasi-contract counterclaims. It is also necessary to conduct a pretrial hearing regarding the expert testimony supporting Enclave's malpractice claim.

Enclave's application is **GRANTED in part**, and summary judgment is hereby entered in its favor as to Count 1 of Elite's counterclaim. Elite's application is **GRANTED in part**, and summary judgment is hereby entered in its favor as to Counts 4, 5, 6, 7, 9, and 12 of the Verified Complaint. SDA and Scheerer's motion for summary judgment is **DENIED without prejudice**.

An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision. The filing of the Order and this Memorandum on e-courts shall serve as service of same on all counsel of record.

Sarah Beth Johnson

SARAH BETH JOHNSON, J.S.C.