STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO. 18-CP-10-3825
	)	
K-CON, INC.,	)	
	)	
PLAINTIFF,	)	
	)	
VS	)	**MEMORANDUM**
	)	
KING STREET ENTERPRISES, LLC., OHIO IMAGING ASSOCIATES, LLC., MARY ANN KANTERS COOK, AND DR. ALBERT JAMES COOK, II,	)	
DEFENDANTS.	)	

I. Defendants, Dr. Albert James Cook and Mary Cook, should not be held personally liable for actions performed in their corporate capacities.

The Plaintiff, by its counsel, asserts in their pleadings that the Defendants, Dr. Albert James Cook and Mary Cook, are individually liable for conduct done in relation to this suit. The Defendants, Dr. Albert James Cook and Mary Cook, maintain that all their dealings with the Plaintiff were done in their capacity as agents for the Defendants, Ohio Imaging Associates, Inc. and King St. Enterprises, LLC, within their authority and in furtherance of its interest. Therefore, defendants are not personally liable for any damages that Plaintiff alleges resulted from the breach of the contract and other causes of actions against the defendants in their agency capacities.

S.C. Code Ann. § 33-44-303 of the Uniform Liability Company Act of 1996 provides as follows:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A

member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

(b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

(c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

"Where an agent enters into a contract for a known principal, while acting within his authority as agent, he is not personally liable on the result of the contract. The liability, if any, for a breach of contract is that of the principal alone." *Green v. Indus. Life & Health Ins. Co.* 199 SC 262, 18 S.E. 2d 873. In *Dutch Fork*, the appellant was the manager (the agent) of his limited liability company (the principal). *Dutch Fork Dev. Grp. II LLC v. SEL Props., LLC,* 406 S.C. 596, 753 S.E.2d 840 (2012). He claimed that, as the manager of said company, he could not be held individually liable for tortious interference with a contract, as he acted on behalf of his company and was, effectively, a party to the contract breached by his company. The Supreme Court ["rejected Appellant's contention that a manager of an LLC may not be held individually liable for torts of the LLC"(following *16 Jade Street, LLC v. R. Design Constr. Co., LLC,* 398 S.C. 338, 728 S.E.2d 448

(2012)), but then held that since there was no evidence that the appellant-manager exceeded his authority, his actions can only be attributable to his company.]

The Supreme Court of South Carolina, following the *Jade Street* case, which also involved a claim against a manager of his and his wife's limited liability company, determined that the appellant-manager could be held to be individually liable for wrongfully interfering with his company's contracts depending on the manager's authority and whether he exceeded his authority, but the Court's analysis ultimately focused, as in the Jade Street case, on the appellant's position as an employee or officer of his limited liability company. *Dutch Fork Dev. Grp. II LLC v. SEL Props., LLC,* 406 S.C. 601, 753 S.E.2d 845 (2012).

Here, the Defendants, Dr. Albert James Cook and Mary Cook, acting as officers and agents of the Defendants, Ohio Imaging Associates, Inc. and King St. Enterprises, LLC, were working in their capacity as agents of their LLC. Defendant Ms. Cook is the authorizing agent for Ohio Imaging, and acted within her capacity under authority of the LLC, when she instructed Plaintiff K-Con, to install the hot water heaters per the architectural plans. K-Con alleges that Defendants should be personally liable for a breach of the contract because they contend the contract called for just one hot water heater.

In the deposition of Dan D'Orio, the operations manager for K-Con, he acknowledged that Defendant, Ms. Cook, was acting in her capacity as a representative for Ohio Imaging. Pg. 14 P. 17-21.

> "Q. So when you were relying on he communications and having negotiations with Ms. Cook, it was in her capacity as a representative for Ohio Imaging, correct?
>
> **A. Yes."**

Furthermore, he acknowledged that Ms. Cook was not acting individually, and was acting as an authority for Defendant, Ohio Imaging. Pg. 21 P. 3-14.

Q. "Okay. So, when the language refers to both of them, for example, Ohio Imaging and Ms. Cook did not tell K-Con they're really one in the same for

purposes of this contact? She's an agent for Ohio Imaging. She's just the one you were speaking to on behalf of Ohio Imaging.

A. I believe I used the word "authority." I believe that's what's in the contract.

Q. In other words, she's not acting individually; she's acting as an authority for Ohio Imaging?

A. Yes."

By acting within her authorized capacity, Ms. Cook cannot be held personally liable for acting as manager of Ohio Imaging. Section 33-44-303 shields Defendants, Dr. Albert James Cook and Mary Cook, from personal liability for any acts they undertook as agents of the Defendants, Ohio Imaging Associates, Inc. and King St. Enterprises, LLC. In such a situation, only the LLC may be found liable. *See, Dutch Fork Dev. Grp. II LLC v. SEL Props., LLC,* 406 S.C. 596, 753 S.E.2d 840 (2012) (where LLC's manager acted within the scope of his authority in taking actions that interfered with the contract, manager was not subject to personal liability for tortious interference with contract); S.C. Code Ann. § 33-44-302 ("A limited liability company is liable for loss or injury caused to a person for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a member or manager acting in the ordinary course of business of the company or with authority of the company.")

In conclusion, Defendants, acting within their authority as officers and agents of the Defendants, Ohio Imaging Associates, Inc. and King St. Enterprises, LLC as undisputed by Plaintiff, are not personally liable for alleged damages to Plaintiff arising from the alleged breach of the agreement at issue here, and therefore, should be dismissed from the lawsuit.

II. The acts complained of are not fraud / torts under the elements;

The elements of the following torts that Plaintiff has alleged have not been met and should be dismissed.

A. Fraud in the inducement

The Plaintiff has not met the required elements to establish a proper fraud in the inducement claim against the Defendants. "In order to establish a claim for fraud in the inducement to enter a contract, a party must establish the following by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury."); Rule 9(b), SCRCP ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."; *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 440, 339 S.E.2d 142, 145 (Ct. App. 1985). The failure to prove any element of fraud or misrepresentation is fatal to the claim. *Id.* Further, in *Regions Bank v. Schmuch, 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct. App. 2003),* the court held, "The right to rely must be determined in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him." *Id.* at 672, 582 S.E.2d at 445. Fraud must be shown by clear and convincing evidence. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). A party may not rely upon a misstatement of fact when the truth is easily within his reach. *King v. Oxford*, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984). "It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests." *Id.* However, a party may rely on representations without making further inquiry when a fiduciary or confidential relationship exists between the parties. *Epstein v. Howell*, 308 S.C. 528, 530-31, 419 S.E.2d 379, 380-82 (Ct. App. 1992).

i. Element one of Fraud: A representation

Looking to the first element of fraud, "ordinarily, a fraudulent representation must relate to a present or preexisting fact and cannot be based on unfulfilled promises or statements about future events. *Woodward v. Todd,* 270 S.C. 82, 240 S.E.2d 641 (1978). However, a fraudulent misrepresentation of a fact occurs when a person promises to do a certain thing and, at the time, has no intention of keeping the promise." *Davis v. Upton,* 250 S.C. 288, 157 S.E.2d 567 (1967). quoting *Sorin Equip. Co. v. The Firm, Inc.*, 323 S.C. 359, 366, 474 S.E.2d 819, 823 (Ct. App. 1996).

Here, the Plaintiff claims a representation was made when the Defendant signed the contract which included a "proposal" to alter the required hot water heater in each restroom in exchange for one large (30 gallon) hot water heater. P. 32. In paragraph 29 of the complaint, the Plaintiff states:

> 29. "K-Con's Proposal specifically stated that the scope of work in the Proposal defined the entirety of the products and services K-Con proposed to provide. Among other things, K-Con's proposal specifically stated that K-Con would provide one (1) 30-gallon hot water heater instead of an individual hot water heater for each restroom."

The Defendants relied on the architectural plans that provided for four individual water heaters. The Plaintiff may have mistakenly assumed that because the Defendants did not respond to the proposal that it was agreed upon, but this was not the case. Hence, this was at best a bilateral mistake between both parties that arises out of a contract dispute. Therefore, this is not be a fraudulent representation.

ii. Element Four: knowledge of its falsity or a reckless disregard of its truth or falsity

The Plaintiff must prove that Defendants had knowledge of the falsity or reckless disregarded truth or falsity. Reckless disregard exists where one makes a statement and knows he lacks the knowledge necessary to be confident that the statement is true. *Woods v. State,* 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993).

The Defendant, Ms. Cook, acting on behalf of Ohio Imaging, did not have knowledge that the Plaintiff would act on the "**proposal**" it made without having further authority to do so. As stated above, Ms. Cook believed Plaintiff, K-Con, was merely providing an alternative to installing separate hot water heaters for the bathrooms, one that was never agreed to. She never intended for them to install a singular water heater. Therefore, Ms. Cook did not have knowledge of the falsity. Furthermore, if anything, this was a misunderstanding as opposed to reckless disregard.

iii. Element Five: Intent that the representation be acted upon

Element five also has not been met: "intent that the representation be acted upon." The Defendant, Ms. Cook acting on behalf of Ohio Imaging, never intended for the Plaintiff to act upon its **"proposal"** to change the hot water heater for each restroom to one large (30 gallon) hot water heater and intended K-Con to install individual water heaters for the bathrooms. In the deposition of Dan D'Orio, the operations manager for K-Con, he acknowledged that if this was a misunderstanding then it would not be intentional. Pg. 29. P. 10.

In conclusion, the elements of fraud are not met and, 'the failure to prove any element of fraud or misrepresentation is fatal to the claim." *Winburn*, 287 S.C. 435. Therefore, the element of fraud should be dismissed from the complaint.

B. Negligent Misrepresentation

In order to assert negligent misrepresentation against Dr. Cook. "The plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." (emphasis added)); *Jefferies v. Phillips*,

316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992)).

Here, in the Plaintiff's complaint, the Plaintiff stated "Dr. Cook **directed** K-Con to install three (3) insta-hot water heaters as opposed to the one (1) 30-gall hot water heater, and directed K-Con to perform other work related to the up fit of Suite 205 that was not required by the contract." P. 54. However, Dan D'Orio, the operations manager for K-Con, conceded in his deposition that Dr. Cook was just there to assist Ms. Cook and did not direct K-Con to make the changes.

"Q. Did he (Dr. Cook) direct K-Con to install hot water heaters that were different than what was required by the contract?

A. Yes.

Q. And what capacity would he have done that?

A. With Mary Ann at the meeting -- the aforementioned meeting, he's the one that came up with the plan.

Q. Okay. So working on behalf of Ohio Imaging with Mary Ann, they directed things be different -- they directed that things be done different than what had been the understanding of K-Con as to the contract?

A. Well, I'm going to change my answer. He did not direct us. He came up with the plan. I said to Mary Ann, you're the authority, is that what you want to do?

Q. Okay.

A. So our direction came from Mary Ann. The plan came from Dr. Cook."

(Pg. 27 p. 2-21).

Dr. Cook could not have misrepresented to the Plaintiff to install three (3) insta-hot water heater if they were relying on the direction of Ms. Cook. Therefore, negligent misrepresentation should be dismissed as a cause of action against Dr. Cook.

C. Tortious Interference

The cause of action for tortious interference against Dr. Cook should be dismissed because the elements are not met. "The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *Threlkeld v. Christoph,* 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct.App.1984). "Therefore, it does not protect a party to a contract from actions of the other party." *Id.* quoting *Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC,* 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012)

In the Plaintiff's complaint, it states "Dr. Cook intentionally directed K-con to install hot water heaters in Suite 205 that were different from what was required by the Contract and as stated in K-Con's Proposal, and thereby directed K-Con to breach the Contract with Ohio Imaging." However, Dan D'Orio, the operations manager for K-Con, conceded in his deposition that K-Con relied on Ms. Cook's authority to do so (as stated above). Therefore, Dr. Cook could not have interfered with the contract if K-Con relied at best on the Ms. Cook's "direction" to make the decisions for Ohio Imaging.

III. The Economic Loss Rule should bar the Tort Claims for Personal Liability

Regardless of if the Plaintiff has properly brought tort claims against the Defendants, these claims should be barred under the "Economic Loss Rule." "The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract.

Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009). "The framework we adopt focuses on activity, not consequence. If a builder performs construction in such a way that he violates a contractual duty only, then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort. Where the builder's actions are grossly negligent, of course, punitive damages may be sought." *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 345–46, 384 S.E.2d 730, 737 (1989). The economic loss rule applies where the duties owed are created solely by contract. *Id.*

Here, the parties had a contract to perform construction work on the Defendants' property. This dispute arose out of a **"proposal"** to change from a HWH for each individual bathroom to one large stand-alone HWH for all the bathrooms. The Plaintiff contends that because the Defendants did not respond one way or the other to the **"proposal"** that it became a part of the contract. The Plaintiff contends it was fraudulently misrepresented when the Defendants asked them to fix their work that had been incorrectly done. This is simply a contractual dispute. The Supreme Court has held that it focuses on the activity, not consequence, unless a legal duty was breached. The defendants breached no legal duty here. This is a mere misunderstanding of the terms of the contract. Therefore, the tortious claims against the Defendants should be dismissed because of the "Economic Loss Rule."

Conclusion

In Conclusion, the Defendants, Dr. Albert James Cook and Mary Cook, should be dismissed from the Plaintiff's Complaint in their individual capacity, as whatever conduct they performed was within their agent authority, acting in their corporate capacities. Additionally, the torts the Plaintiffs alleged should be dismissed because the elements of the torts are not met.

Furthermore, the Plaintiff should be barred from seeking tort damages under the "Economic Loss Rule", which further limits the personal liability of the Defendants. Therefore, the Defendants, Dr. Albert James Cook and Mary Cook, should be dismissed from any personal liability of the complaint.

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