

Appellate Division Holds Corporate Officers and Employees Potentially Liable Under Consumer Fraud Act Based on Regulatory Violation

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June 30, 2010

On June 23, 2010, the New Jersey Superior Court, Appellate Division, in *Allen v. V and A Brothers, Inc.*, held that where a corporation commits a regulatory violation of the Consumer Fraud Act (CFA), its officers and employees are potentially liable where there is proof that the individuals personally participated in the activities that constituted the violation.

The holding arises out of a suit brought by homeowners against a landscape business, its principals and employee, alleging breach of contract and regulatory violation of the New Jersey Consumer Fraud Act for the improper construction of a retaining wall and substitution of inferior backfill from that specified in the plans, resulting in the failure of the wall and substantial property damage. Plaintiffs prevailed on their claims against the landscape business, but the trial court dismissed the claims against the individual defendants; the homeowners appealed the dismissal of the CFA claims against individual defendants. Relying on the definition of "person," as set forth in the CFA, and on previous case law where courts have imposed personal liability on corporate officers and employees for violation of the CFA based on affirmative acts, the court held that there was sufficient statutory authority to impose personal liability on corporate officers and employees for a regulatory violation where "the individual committed the unconscionable commercial practice or other prohibited act."

Previously, New Jersey courts have imposed personal liability on corporate officers under the participation theory where the underlying claim was based on tort and the affirmative actions of the individual defendants. See for example *Gennari v. Weichert Co. Realtors*, 148 N.J. 582 (1997); and *New Mea Const. Corp. v. Harper*, 203 N.J. Super. 486 (App. Div. 1985). However, this is the first time a New Jersey court has held that corporate officers and employees may be found personally liable under the CFA where the underlying claim is based on a regulatory violation of the CFA, which consisted of the builder's failure to execute a written contract for the work as required by a regulation promulgated pursuant to the CFA.

Although the Appellate Division found the trial court's dismissal of claims against the three individual defendants erroneous, it did not find that the three individual defendants were automatically liable under the CFA. Instead, it remanded the issue of defendants' personal liability to the trial court, holding that liability was contingent on whether plaintiffs could provide proof of defendants' personal participation in the regulatory violation.

The opinion is significant because it permits the imposition of personal liability against corporate officers and employees based on a technical violation of the CFA.

If you have any questions concerning this issue, please contact Jim Lisovicz or George Kelman