SUPERIOR COURT OF NEW JERSEY

ROBERT P. CONTILLO, P.J.Ch.
CHANCERY DIVISION

BERGEN COUNTY JUSTICE CENTER
Suite 420
HACKENSACK, N.J. 07601
(201) 527-2615

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**VIA FACSIMILE AND REGULAR MAIL**

Michael B. Kates, Esq
Cara Landolfi, Esq.
Kates Nussman Rapone
Ellis & Farhi LLP
190 Moore Street
Hackensack, NJ 07601

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Robert P. Contillo
P.J.Ch.

Joseph B. Fiorenzo, Esq.
Sills Cummis & Gross
One Riverfront Plaza
Newark, NJ 07102

Stuart Reiser, Esq.
Shapiro, Croland, Reiser,
Apfel & DiIorio
411 Hackensack Avenue
Hackensack, NJ 07601

Re: Avery v. Brunelleschi Construction
Docket No. C-366-15

: Letter Decision on Application to Confirm Arbitration Award and Motions to Vacate Arbitration Award

Dear Counsel:

## I. Statement of the Case

Before the court is an Order to Show Cause filed by plaintiffs Robert Avery and Peng Avery ("Plaintiffs") on December 7, 2015, a Motion to Vacate Arbitration Award filed by defendant Anthony Carrino ("Carrino") on January 20, 2016, and a Motion to Vacate Arbitration

Award filed by defendant John Colaneri, also filed on January 20, 2016. Plaintiffs filed their reply on January 29, 2016. Colaneri and Carrino filed separate replies on February 1, 2016. Plaintiffs filed a sur-reply on February 3, 2016. Colaneri and Carrino filed separate sur-sur replies on February 3, 2016.The court heard oral argument on February 10, 2016, and again on March 1, 2016. A final submission from Plaintiffs was received on March 7, 2016, to which Defendants filed separate replies on March 11, 2016.

On October 15, 2012, Plaintiffs purchased a residence at 230 Engle Street, Tenafly, New Jersey (the "Property") and chose to renovate the property. (Verified Complaint at ¶ 10). Brunelleschi Construction, LLC ("Brunelleschi") is New Jersey construction firm. (Id. at ¶ 2). Anthony Carrino is a principal and co-owner of Brunelleschi. (Certification of John Colaneri ("Colaneri Cert.") at ¶ 2). Alfonso Carrino ("Alfonso") is the other principal and co-owner of Brunelleschi. (Id.). John Colaneri is the cousin of Carrino, nephew of Alfonso, and was Senior Project Manager for Brunelleschi until December 2014. (Id. at ¶ 3). On February 14, 2013, Plaintiffs and Brunelleschi entered into a written contract (the "Contract"), where Brunelleschi agreed to complete construction and renovation work (the "Renovation Project") on the Property. (Id. at ¶ 11). The Contract is signed by Plaintiffs and Carrino. (Ex. B to id. ("Contract")).

Paragraph 13 of the Contract, "Jurisdiction", states that the parties consent to the jurisdiction of New Jersey Superior Court "to adjudicate any dispute arising out of this Contractor Agreement which is not otherwise subject to arbitration." (Id. at ¶ 13). Paragraph 14 of the Contract, "Arbitration", states that "[a]ny dispute or difference between the Contractor and Owner arising out of and during the currency of the Agreement or upon termination or cancellation thereof, shall be referred to arbitration." (Id. at ¶ 14). Under Paragraph 15, "Party Status", the Contract states that "Contractor represents that Anthony Carrino and John Colaneri

("the Cousins") are principals of Brunelleschi Construction...". (Id. at ¶ 15). Pursuant to the terms of the Contract, Plaintiffs were to pay Brunelleschi 33% of the contract price upon initiation of the project, 34% of the contract price upon passing of rough electrical, plumbing and building inspections, and the final 33% upon passing of all final inspections and the issuance of a Certificate of Occupancy by the Tenafly Building Department. (Id. at ¶ 3).

On July 30, 2013, Plaintiffs gave notice of Contractor's Default. (Ex. M to Fiorenzo Cert.). Plaintiffs then sent a notice of termination on September 16, 2013. (Ex. N to id.). On October 30, 2013, Brunelleschi initiated arbitration under Paragraph 14 of the Contract against Plaintiffs. (Verified Complaint at ¶ 12). Plaintiffs filed a Verified Complaint and Order to Show Cause with Temporary Restraints ("First OSC") on November 20, 2013, seeking to have the matter removed from arbitration. On November 21, 2013, the Hon. Lisa Friscia held oral argument on the application. (Ex. W to Certification of Joseph Fiorenzo ("Fiorenzo Cert.")). At oral argument Michael Kates, Esq. ("Kates") appeared on behalf of Plaintiffs and Michael Orozco, Esq. ("Orozco") entered his appearance on the record "on behalf of all defendants." (Id. at 3:8-10). Kates sought a stipulation on the record that he could raise claims against individuals in arbitration under the Consumer Fraud Act ("CFA"). (Id. at 14:-4-7). In response, Orozco stated "Any and all claims. That's what the provision states. Any and all claims. So if he wants to sue the – the principals, he wants to sue me, he wants to sue anybody he wants, bring it. Bring it. That's arbitration … the correct forum is arbitration not this Court." (Id. at 17:4-8; 17:13-14). Plaintiffs then withdrew the First OSC without prejudice, and an order was entered to that effect. (Certification of Michael Kates ("Kates Cert.") at ¶ 11).

On November 27, 2013, Plaintiffs filed an Arbitration Answer and Counterclaims against Brunelleschi and joined Colaneri, Carrino, and Alfonso. (Ex. 25 to Certification of Cara

Landolfi ("Landolfi Cert.")). As to joinder of the individuals, the American Arbitration Association ("AAA") requested the parties either consent or submit comments on the issue by December 27, 2013. (Ex. 27 to Landolfi Cert.). By letter dated December 27, 2013, Orozco specifically objected to the joinder in arbitration of the "principals of Brunelleschi". (Ex. 29 to Landolfi Cert.). On January 21, 2014, the AAA appointed Sheryl Mintz-Goski, Esq. ("Goski") as the Rule 7 Arbitrator. (Ex. 31 to Landolfi Cert.). On February 13, 2014, Goski issued an Interim Order determining that "Claimant's principals *may* be joined in this Arbitration." (Emphasis in original). (Ex. 32 to Landolfi Cert.). The Rule 7 Arbitrator further specified that she made "no determination as to the specific individuals who may be joined." (Id.). Kates certifies that on February 17, 2014, Orozco, Kates and Goski held a conference call where Orozco consented to the joinder of Carrino based on his status as a signatory of the Contract and as a principal of Brunelleschi. (Kates Cert. at ¶ 16). On March 11, 2014, Goski issued her Second and Final Opinion, finding that Carrino could be joined as a principal and signatory of the Contract and Colaneri could be joined because Plaintiffs have "asserted claims specifically regarding representations by John as to inspections related to work performed by Claimant." (Ex. 35 to Landolfi Cert.). Goski declined to allow joinder of Alfonso. (Id.). On April 9, 2014, Orozco filed an Answer and Counterclaim on behalf of Brunelleschi, Colaneri, and Carrino. (Ex. 36 to Landolfi Cert.).

On May 21, 2014, the AAA appointed Lee Tesser, Esq. ("Tesser") to server as arbitrator on the substantive claims. (Ex. 37 to Landolfi Cert.). Plaintiffs filed an Amended Answer, Counterclaim, and Answer to the Counterclaims of Carrino and Colaneri on July 11, 2014 and Defendants filed an Amended Complaint, Answer, and Counterclaims on July 14, 2014. (Ex.

38-39 to Landolfi Cert.). On July 14, 2014, Plaintiffs filed an Amended Answer Statement to Carrino and Colaneri's Counterclaims. (Ex. 40 to Landolfi Cert.).

The Arbitration hearings commenced on October 27, 2014 with Orozco appearing on behalf of Brunelleschi, Colaneri, and Carrino. (Kates Cert. at ¶ 22). Orozco also prosecuted Carrino and Colaneri's counterclaims on behalf of those individuals. (Id.). From October 27, 2014 through May 18, 2015, ten evidentiary hearings were held. (Id. at ¶ 23). At the conclusion of the evidentiary hearings, Tesser advised that he would like both parties to submit post-hearing briefs and advise the arbitrator to choose the type of award to be issued. (Id. at ¶ 24-25). On June 30, 2015, the parties submitted their post-hearing briefs and proposed forms of order. (Ex. A to Fiorenzo Cert.; Ex. 41 to Landolfi Cert.). Kates sought a "reasoned award", but Orozco did not consent. (Id. at ¶ 25, 27).

On July 23, 2015, Tesser issued a standard award, which held Brunelleschi, Colaneri, and Carrino jointly and severally liable for the sum of $857,894.21 (the "Award"). (Ex. 42 to Landolfi Cert.). Plaintiffs filed an Order to Show Cause to confirm the Award on July 25, 2015. (Kates Cert. at ¶ 2). Shortly thereafter, Defendants filed separate bankruptcy petitions in the Bankruptcy Court for the District of New Jersey, which institute an automatic stay. (Id. at ¶ 4). On December 4, 2015, the Bankruptcy Court entered an Order lifting the automatic stay and thus permitting Plaintiffs to once again seek confirmation of the award in New Jersey Superior Court. (Id. at ¶ 6).

## II. Plaintiffs' Order to Show Cause

Plaintiffs request an Order against Brunelleschi, Carrino, and Colaneri: (a) confirming the Arbitration Award; (b) directing the entry of judgment on the award in favor of Plaintiffs and against Defendants, jointly and severally, in the amount of $857,894.21, with pre and post-

judgment interest, attorney's fees, and costs; and (c) authorizing Plaintiffs the right to recover upon post-judgment motion costs and attorney's fees incurred in any necessary subsequent judicial proceedings to enforce the judgment. (Verified Complaint).

**III. Carrino's Motion to Vacate Arbitration Award**

Carrino argues that there was no agreement to arbitrate as to Carrino. (Carrino's Brief at p. 7). Further, Carrino contends that the arbitrator incorrectly determined that traditional state law contract principles, such as equitable estoppel and agency theory, apply here to bind Carrino. (Id.). Carrino argues that Goski improperly determined that Plaintiff detrimentally relied on the representations made by Orozco during the First OSC that the individual claims could be brought through arbitration. (Id. at p. 8). Carrino asserts that in the First OSC, the court acknowledged that Plaintiff could proceed against Carrino in state court for any individual claims. (Id. at p. 9). Therefore, Carrino contends that the element of detrimental reliance is absent and so there was no basis in law for the Goski to find that equitable estoppel applies. (Id.).

Next, Carrino argues that agency theory does not apply to this contract because Carrino did not individually benefit from or act to bind himself to the contract. (Id. at p. 10). Carrino also asserts that it would be inequitable to bind Carrino simply because he affixed his signature on behalf of the company. (Id. at p. 11). In addition, Carrino argues that the Contract did not contemplate arbitrating individual claims intertwined with the contract. (Id.). Further, Carrino contends that the New Jersey Supreme Court has rejected the intertwinement theory as a basis to apply agency. (Id.).

Finally, Carrino argues that Goski exceeded her powers by concluding that Carrino could be held individually liable because there is no evidence that Carrino had sufficient involvement with the Project to give rise to individual liability under the CFA. (Id. at p. 13). Carrino

contends that the Contract limits the arbitrator's powers to any dispute between the Plaintiffs and Brunelleschi, and not to individual non-signatories. (Id. at p. 14).

**IV. Colaneri's Motion to Vacate Arbitration Award**

Colaneri first argues that the Federal Arbitration Act ("FAA") applies to this contract because there is no choice of law provision in the Contract and the Contract affects interstate commerce as the parties contracted for a large portion of the renovation materials to come from outside New Jersey. (Colaneri Brief at pp. 17-18). Next, Colaneri contends that Golski exceeded her powers by providing an award with no rational basis. (Id. at p. 19). Colaneri asserts that he was not managing the renovation nor participating in the work for which Golski awarded damages and so should not face joint and several liability. (Id. at p. 20). Further, Colaneri argues that Colaneri cannot be held jointly and severally liable for contract damages. (Id. at p. 25). Colaneri asserts that there is no theory of liability that would permit an arbitrator to impose contract damages on a nonparty to the contract. (Id.).

In addition, Colaneri contends that the portion of the Award that holds Colaneri responsible for damages caused by his employer's CFA violations is also irrational. (Id. at p. 27). Colaneri asserts that Plaintiffs allege that Colaneri was responsible for only one violation of the CFA: falsely representing that Plaintiffs were required to tender payment because the renovations passed all necessary inspections. (Id. at p. 29-30). However, Colaneri argues that this misrepresentation caused no damages because Plaintiffs refused to pay. (Id. at p. 30). Therefore, Colaneri contends that without proof that the CFA damages were caused by the particular acts that Colaneri individually undertook, Golski could not rationally find joint and several liability. (Id.).

Colaneri also argues the court should vacate or modify the award because Golski made an award on a claim not submitted to the arbitrator. (Id. at p. 31). Colaneri asserts that Plaintiffs never requested or argued for Colaneri to be personally liable for Brunelleschi's alleged wrongful conduct and never mentioned joint and several liability for Colaneri in their briefing or during the hearings. (Id.).

Colaneri then contends that Golski exceeded the arbitrator's powers by considering claims against individuals, as the Contract only empowered Golski to consider claims between Plaintiffs and Brunelleschi. (Id. at p. 32). Colaneri also asserts that he objected to the jurisdiction of the arbitrator to rule on claims against him individually and did not have to try to enjoin or stay the arbitration in order to preserve this objection. (Id. at p. 33). Colaneri argues that Colaneri was not a party to the contract and therefore Colaneri should not be bound because there was no agreement to arbitrate. (Id. at p. 34). Colaneri asserts that he preserved his objection to the arbitrator's jurisdiction and that a nonsignatory is not bound by an arbitration provision. (Id. at p. 35).

Colaneri argues that agency principles cannot bind Colaneri to the arbitration agreement because: (1) Colaneri did not vest in Brunelleschi any power to act on his behalf; (2) if Colaneri acted as Brunelleschi's agent, that relationship cannot permit the principal (Brunelleschi) to bind the agent (Colaneri) in arbitration; (3) Colaneri had no authority to control Brunelleschi and so could not constitute a principal. (Id. at p. 36). Colaneri also contends that Colaneri cannot be estopped from contesting arbitration because Orozco had no authority to bind Colaneri during the First OSC. (Id. at p. 37). Colaneri asserts that Colaneri did not receive notice of the First OSC, did not know of the hearing, and did not hire Orozco to represent him at the hearing. (Id.

at p. 37-38). Colaneri asserts that Orozco had no authority at the time of the hearing to bind Colaneri and so Orozco could not waive Colaneri's rights at the First OSC hearing. (Id. at p. 40).

**V. Plaintiffs' Reply**

Plaintiffs first argue that the FAA does not apply here because the instant matter does not involve interstate commerce. (Plaintiffs' Reply at p. 25). Plaintiffs assert that there is no nexus to interstate commerce because Plaintiffs, New Jersey residents, contracted with Brunelleschi, a New Jersey business, for the construction of their home located in New Jersey. (Id.). Plaintiffs next argue that the arbitrator had a basis to impose individual liability. (Id. at p. 31). Plaintiffs assert that under the CFA, a principle, corporate officer, agent, or employee of a company can be held personally responsible for any of their affirmative acts, knowing omissions, or regulatory violation. (Id. at p. 39-40). Further, Plaintiffs argue that principals can be broadly liable for regulatory violations, as they are in control and set the business policies. (Id. at p. 40).

Plaintiffs state that the Contract names Colaneri as a principal of Brunelleschi and Colaneri held himself out as a principal, so it would be inequitable for Colaneri to claim he is not a principal now. (Id. at p. 41). Therefore, Plaintiffs contend that both Carrino and Colaneri are individually liable as they were the principals of Brunelleschi who were in control of the business and set the policies and were involved in managing the projects. (Id. at p. 42). Further, Plaintiffs state that Carrino is personally liable for his own representations.

Next, Plaintiffs contend that, regardless of whether Colaneri was a principal, he was properly joined in the arbitration because he was intimately involved with the project as the project manager and was liable for his own affirmative acts of misrepresentation. (Id. at p. 43). Further, Plaintiffs assert that Brunelleschi owed a duty of care to Plaintiffs, Brunelleschi delegated that duty to Carrino and Colaneri, and Carrino and Colaneri breached that duty by

personally making fraudulent misrepresentations to Plaintiffs. (Id. at p. 46). Plaintiffs argue that Colaneri was sufficiently involved in the commission of the fraud as he was project manager and personally made misrepresentations to coerce payments. (Id.). In addition, Plaintiffs contend that Carrino furthered Colaneri's misrepresentations by corroborating Colaneri's demands for final payment and ultimately pulling Brunelleschi from the job. (Id.).

Plaintiffs argue that Plaintiffs were not limited to only pursuing statutory claims against Colaneri and Carrino, because Tesser authorized the parties to amend their pleadings and Colaneri and Carrino did not object to the additional counts brought against them in Plaintiffs' amended pleadings. (Id. at p. 48-49). Plaintiff then contest Colaneri's argument that Tesser irrationally awarded relief that was not requested, asserting that Plaintiffs' specifically requested to be granted damages of $2,073,049.00 jointly and severally against Brunelleschi, Colaneri, and Carrino. (Id. at p. 50). Plaintiff states that Tesser therefore granted relief that was requested. (Id.). Plaintiffs also contest Colaneri's argument that Tesser awarded damages against individual defendants based on Plaintiffs' contract claims. (Id.). Plaintiffs contend that the claims that form the bases for the damage award cannot be delineated because Colaneri and Carrino opposed a "reasoned award." Plaintiffs argue that it would be inequitable for Colaneri and Carrino to gain from this refusal by asserting the basis for these damages as in contract or the CFA when no 'reasons' were provided. (Id. at p. 51).

Plaintiffs next argue that this case is analogous to Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515 (App. Div. 2010), which held that claims against individuals can be brought in arbitration when an expansive arbitration clause exists and the claims could not be maintained without reference to and reliance upon the underlying contract. (Id. at p. 54-55). Plaintiffs further contend that Colaneri and Carrino should not be allowed to first argue that arbitration is

the appropriate forum for all claims, then argue that they should not have been heard in arbitration after losing at arbitration. (Id. at p. 55). Plaintiff also assert that the holding in Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254 (App. Div. 2001) applies here. (Id. at p. 57). Plaintiffs state that the Jansen court found that if "a substantial nexus exists between the subject matter of the arbitration agreement and the claim raised by plaintiffs," non-signatories may be compelled to arbitrate and be bound by the arbitration clause. (Id.). Plaintiffs assert that Colaneri and Carrino are principals of the claimant Brunelleschi, the claims against the individuals are inextricably intertwined with the Brunelleschi claims, and there is a substantial nexus between the subject matter of the arbitration agreement and the claims raised under the CFA. (Id. at p. 58).

Plaintiffs then argue that equitable estoppel requires Colaneri and Carrino to arbitrate their claims because Plaintiffs relied on the representations of Orozco that Colaneri and Carrino would agree to have "any and all claims", including the claims against them individually, heard in arbitration. (Id. at p. 59). Plaintiffs state that they detrimentally relied upon Orozco's representations at the First OSC hearing by spending over two (2) and a half years and over $200,000.00 to arbitrate their claims against Defendants. (Id. at p. 60). Further, Plaintiffs state that Orozco agreed during a telephone conference that Carrino could be joined in the arbitration as a signatory of the contract and a principal of Brunelleschi. (Id. at p. 61). Plaintiffs state that this fact is illustrated by the fact that the parties only submitted briefs on the issue of joinder of Colaneri and Alfonso Carrino, and not Carrino. (Id.). Plaintiffs then argue that Colaneri and Carrino waived their objections to the jurisdiction of the arbitrator because their objections dealt with the scope of the arbitration clause, not the jurisdiction of the arbitrator. (Id. at p. 62-63).

Plaintiffs also contend that Orozco acted as counsel was an agent of Colaneri and Carrino because Orozco made representations in pleadings and on the record before the arbitrator with Colaneri and Carrino present. (Id. at p. 64). Further, Plaintiffs state that Orozco confirmed that he represented Colaneri and Carrino by filing an Answer and Counterclaims on behalf of Colaneri and Carrino. (Id.). Plaintiffs assert that they reasonably believed and relied upon the representations of Orozco and were entitled to rely upon such representations. (Id.). Finally, Plaintiffs argue that they are entitled to reasonable attorney's fees for these proceedings and pre-judgment interest on the Award.

**VI. Carrino's Reply**

Carrino argues that, with respect to contract negotiations, Plaintiffs fail to cite to any evidence that Carrino actively engaged in negotiations with Plaintiffs. (Carrino Reply at p. 2). Instead, Carrino states that a company employee was the only contact between Brunelleschi and Plaintiffs, while Carrino's role was limited to accepting and rejecting proposed changes to the contract from this employee. (Id.). Carrino then contends that Plaintiffs evidence does not support the claim that Carrino misrepresented to Plaintiffs the status of final inspections and demanded final payment. (Id.). Carrino asserts that when Carrino stated he was in agreement with Colaneri, he was agreeing with an email for Colaneri that did not reference final inspections or payment. (Id.). Carrino also argues that Plaintiffs' claim that Carrino walked off the job is unsupported by the record and irrelevant to the claims that Carrino should be joined in arbitration and that he was connected to any fraud allegations. (Id. at p. 2-3).

Next, Carrino asserts that the fact that Plaintiffs did not have the R-7 joinder ruling confirmed by the court, but instead proceeded to arbitrate, cannot now be cited as a valid basis to find that Carrino induced reliance entitling Plaintiffs to equitable estoppel. (Id. at p. 5-6).

Further, Carrino contends that Plaintiffs were required to arbitrate against Brunelleschi regardless, and so Plaintiffs would have had to spend most of the fees they spent on arbitration anyway. (Id. at p. 6). Carrino also argues that Plaintiffs did not detrimentally rely on Orozco's statements at the First OSC because Plaintiff's Order to Show Cause was withdrawn without prejudice. (Id.). In addition, Carrino contends that the arbitration clause is not broad enough to encompass individual claims against Carrino because it does not explicitly put Carrino on notice that he could be compelled to arbitrate any individual claims. (Id. at p. 7). Finally, Carrino asserts that Plaintiffs have failed to demonstrate Carrino's involvement in any alleged fraudulent conduct, and so the arbitrator's award was irrational. (Id. at p. 8).

## VII. Colaneri's Reply

Colaneri argues that the only personal involvement that Plaintiffs have ever asserted against Colaneri is a purported misrepresentation that caused no damages and was unconnected to the defects for which the arbitrator assessed damages. (Colaneri's Reply at p. 5). Colaneri then asserts that this misrepresentation is not sufficient to hold Colaneri liable for all damages caused by every other violation, committed by other individuals. (Id. at p. 9). Colaneri contends that there is no evidence that Colaneri set any policy related to the damages the arbitrator found or had any input or control over whether employees committed the violations alleged. (Id. at p. 12-13). Colaneri asserts that the only defendant that claimed Colaneri was a principal or would act as a project manager – and the only defendant that can be held responsible for such representations – is Brunelleschi. (Id. at p. 13).

Colaneri next argues that the standard of review of an objection to an arbitrator's jurisdiction is de novo and so the court should give no deference to the arbitrator's ruling on jurisdiction. (Id. at p. 14). Colaneri states that the arbitrator found that Colaneri objected to

jurisdiction, making Plaintiffs' claim that the parties did not object to the jurisdiction of the arbitration false. (Id. at p. 15). Colaneri further states that Colaneri did not have to attempt to enjoin the arbitration to preserve his objection. (Id. at p. 16). Colaneri then contends that Hirsch v. Amper Financial Services, 215 N.J. 174, overruled the holding that a non-party to a contract may be bound to arbitrate if the claims against individuals are inextricably intertwined with the claims against the contracting party. (Id. at p. 16).

Colaneri also argues that Orozco did not have apparent authority to act on Colaneri's behalf because there were no traceable manifestations from Colaneri at the time of the First OSC to lead the public to believe that Colaneri authorized Orozco to represent him. (Id. at p. 20). Colaneri contends that Colaneri therefore would have had to ratify Orozco's representation at the First OSC. (Id. at p. 21). However, Colaneri asserts that Colaneri would have to have knowledge of the material facts involved in Orozco's statement to the court in the First OSC hearing and that Plaintiffs have offered no evidence of any such knowledge. (Id.).

In addition, Colaneri argues that even if the court finds that Orozco's statements bound Colaneri, there can be no equitable estoppel because there was no detrimental reliance. (Id. at p. 22). Colaneri states that Plaintiffs were required to arbitrate against Brunelleschi regardless and cannot identify any portion of the amount spent on arbitration that was attributable to Colaneri solely. (Id.). Finally, Colaneri contends that Plaintiffs never argued or submitted evidence on veil-piercing during the arbitration and so cannot bring it up now. (Id. at p. 23).

Colaneri next states that Plaintiffs do not contest that it was irrational for Tesser to assess contract damages against Colaneri, but instead claim that there is no way to know whether the arbitrator found contract damages because no basis for the Award was provided. (Id. at p. 24-25). Colaneri argues that the Award identifies specific items as damages under the CFA and that

all other damages are clearly contract damages. (Id. at p. 25). Colaneri also contends that Plaintiffs never argued in their joinder briefing, merits briefing, or before Tesser that a non-signatory to the Contract could be liable for breach of contract damages. (Id. at p. 26-27). Therefore, Colaneri asserts that the Award is irrational. (Id. at p. 27).

Colaneri then argues that the FAA governs because the Contract called for the transportation of personnel and materials in interstate commerce, which creates a connection between interstate commerce that implicates the FAA. (Id. at p. 27). Colaneri asserts that, even if the FAA does not apply, the court should vacate the award because the arbitrator committed clear errors of law. (Id. at p. 30-31). Colaneri next contends that submitting a proposed order seeking joint and several liability does not meet the requirement that the arbitrator's award be rationally derived from the parties' submissions to the arbitrator. (Id. at p. 31-32). Finally, Colaneri argues that prejudgment interest is not available to Plaintiffs because the rules cited by Plaintiffs regarding prejudgment interest have no application to arbitration proceedings. (Id. at p. 32).

**VIII. Plaintiffs' Sur-Reply**

Plaintiffs argue that the case Highgate Dev. Corp. v. Kirsh, 224 N.J. Super. 328 (App. Div. 1988) is dispositive and pertinent to the issue of whether Defendants waived their right to have the objection heard in court. (Plaintiffs' Sur-Reply at p. 1). Plaintiffs state that Highgate is analogous to the instant matter and stands for the proposition that a party, based on their conduct or agreement, may waive their right to a judicial determination, even if they raise an objection to the arbitrator's jurisdiction. (Id.). Plaintiffs contend that Defendants availed themselves to the jurisdiction of the arbitrator even after objecting by participating in the entire arbitration and not seeking judicial intervention until after receiving an unfavorable award. (Id. at p. 2).

**IX. Colaneri's Sur-Sur Reply**

Colaneri first states that Plaintiffs do not dispute that under the FAA, once a party files an objection to the arbitrator's jurisdiction, it is preserved for review by the court. (Colaneri Sur-Sur Reply at p. 1). Colaneri then argues that Kirsch, cited by Plaintiffs, is superseded by the New Jersey Revised Arbitration Act of 2003 ("2003 Act"). (Id.). Colaneri asserts that the 2003 Act created an express and explicit right to contest jurisdiction, which is preserved as long as an objection is raised. (Id. at p. 2). Further, Colaneri contends that the 2003 Act explicitly states that the right to vacate an arbitration award because a party did not agree to arbitrate cannot be waived once an objection is made. (Id.). Therefore, Colaneri asserts that there was no waiver here because Colaneri made an objection to jurisdiction before the hearing. (Id.).

**X. Carrino Sur-Sur Reply**

Carrino adopts the arguments presented in Colaneri's Sur-Sur Reply.

**XI. Plaintiffs' Final Submission**

In their final submission, Plaintiffs provide the court with the expert engineering and accounting reports supplied to the Arbitrator, to further buttress their claims of individual CFA liability on behalf of Colaneri and Carrino.

**XII. Carrino's Final Submission**

Carrino contends that nothing in Plaintiffs' final submission cures the irrationality of the award as to him, or ties him to any requisite ascertainable losses which must be proven to maintain CFA liability against him.

## XIII. Colaneri's Final Submission

Colaneri contends that Plaintiffs' final submission fails to implicate him, personally, in any ascertainable loss to Plaintiffs resulting from his actions, personally, or cures the defects of the Arbitrator's Award previously set forth in their papers.

## DECISION OF THE COURT

### A. Standard of Review

The primary purpose of arbitration is to reach a final disposition "in a speedy, inexpensive, expeditious and perhaps less formal manner." Fawzy v. Fawzy, 199 N.J. 456, 468 (2009) (quoting Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981)). Our courts recognize that "because of the strong judicial presumption in favor of the validity of an arbitral award, the party seeking to vacate it bears a heavy burden." Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004). Arbitration is meant to be "a substitute for not a springboard for litigation." N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292 (2007). "To ensure that finality, as well as to secure arbitration's 'speedy[] and inexpensive' nature there exists a 'strong preference for judicial confirmation of arbitration awards' " Id. (quoting Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 442 (1996)).

The Federal Arbitration Act ("FAA") permits a court to vacate or modify an arbitration award under the following grounds:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

The court may also modify or correct an award:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

Under the New Jersey Revised Arbitration Act, N.J.S.A. § 2A:23B, (the "NJRAA"), courts may vacate an arbitration award under the following grounds:

(1) the award was procured by corruption, fraud, or other undue means;
(2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
(4) an arbitrator exceeded the arbitrator's powers;
(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

§ 2A:23B-23

The court shall also modify or correct an award if:

(1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
(2) the arbitrator made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted

§ 2A:23B-24

The FAA and the NJRAA are "nearly identical." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 440 (2014).

**B. Federal Arbitration Act**

The court must first consider whether the FAA or NJRAA governs this proceeding. The FAA applies broadly to all suits pending in state and federal court when the dispute concerns a "contract evidencing a transaction involving commerce," including "commerce among the several States." 9 U.S.C. §§ 1, 2; See Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 376 (App. Div. 1990). "A nexus to interstate commerce is found when citizens of different states engage in the performance of contractual obligations in one of those states because such a contract necessitates interstate travel of both personnel and payments." Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560, 574 (App. Div. 2007). The FAA applies to arbitration clauses both that are "within the flow of interstate commerce" and cases "without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003).

Here, Plaintiffs are New Jersey residents who contracted with Brunelleschi, a New Jersey business, for the construction of their home located in New Jersey. Plaintiffs do not dispute that the Contract called for the transportation of personnel and materials in interstate commerce. The parties imported significant material from out-of-state and personnel were required to travel to

other states for pricing, selection, and pickup. Under the broad parameters of the FAA, these actions sufficiently involve interstate commerce to require application of the FAA to this case.

**C. Waiver and Estoppel**

Where a party indicates his clear willingness to submit to binding arbitration, and forgo judicial determination of his or her claims, forego judicial review, that party may be deemed to have waived his right to judicial review of the arbitrability issue. However, "[a] jurisdictional objection, once stated, remains preserved for judicial review." Kaplan v. First Options, 19 F.3d 1503, 1510 (3d Cir. 1994). Where a party objects to arbitrability but nevertheless voluntarily participates in the arbitration proceedings, waiver of the challenge to arbitral jurisdiction will not be inferred. Id. "A party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction." Id.

During the First OSC, Plaintiffs requested a stipulation from Defendants' counsel that Plaintiffs could sue individual parties during arbitration. In response, Defendants' counsel, Michael Orozco, Esq., stated on the record before the Hon. Lisa Friscia, "Any and all claims. That's what the provision states. Any and all claims. So if he wants to sue the – the principals, he wants to sue me, he wants to sue anybody he wants, bring it. Bring it. That's arbitration … the correct forum is arbitration not this Court." (Ex. W to Fiorenzo Cert. at 17:4-8; 17:13-14). Later, before the arbitrator Goski, Orozco objected to the joinder of Carrino, Colaneri, and Alfonso during the R-7 hearing. However, Orozco made a clear statement on behalf of all defendants in open court that consented to Plaintiffs bringing claims all claims against each Defendant. Once counsel made this waiver, he could not later object to seek to preserve the jurisdiction issue for judicial review.

Specifically, after having placed on the record his appearance on behalf of all defendants, counsel confirmed that claims against the defendants personally, claims that seek to pierce the corporate veil of the company, would "stay in arbitration". T 11, Line 10-16 (cite appropriately). "All claims", counsel clarified, T 11, Line 19-20. He further conceded that the contract arbitration clause was "broad enough to include everything". T 12, L 23-25. ". . . all of those claims can be adjudicated in the arbitration hearing". T 13, L 19-20. Orafco represented on behalf of present defendants that the Averys could raise claims against the individuals in arbitration. T 14, L 4-16. While not agreeing that plaintiff had the right to pierce the corporate veil, the claims would be decided, not in the Superior Court, but in arbitration. T 16, L 22-25; T 17, L 1-4. Claims against the principals were to be in arbitration, the "correct forum". T 17, L 4-14. There is no question of whether those claims would be decided in arbitration. They would be. The transcript is simply not susceptible to a contrary reading. And on that unambiguous representation of Defendants' counsel, Plaintiffs withdrew their objection to arbitrating all claims, just as Defendants had agreed to do. There was a clear, unconditional waiver by the Defendants' counsel to any objection to having the claims against all defendants resolved in arbitration, with no preservation of any right to argue to the contrary in arbitration, or later on, in court, after receiving an adverse decision by the arbitrator on the merits. That is precisely contrary to the representations of counsel on the record, and is entirely ineffectual.

Colaneri claims that he did not receive notice of the First OSC, did not attend the hearing, and did not hire Orozco to represent him at the hearing. Therefore, Colaneri contends that he should not be bound by any waiver made by counsel. During the First OSC hearing, Orozco stated on the record that he was appearing "on behalf of all defendants." (Id. at 3:8-10). Further, it is undisputed that Orozco represented Colaneri during the two-year arbitration, as Orozco

submitted an Answer and Counterclaims on behalf of Colaneri and prosecuted Colaneri's Counterclaims during the arbitration in the presence of Colaneri. Colaneri never once sought to correct the purported misrepresentation of his counsel, Orozco, at the First OSC. It is too late to do so now. Colaneri asserts that Orozco did not have apparent authority to bind him at the First OSC. Apparent authority arises "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010). In this case, the record reveals no instance where Colaneri himself made any manifestations that would lead Plaintiffs to believe Orozco lacked actual or apparent authority at the First OSC. Nevertheless, after Orozco made those representations, Colaneri never sought to correct them, and Colaneri retained Orozco to represent him in the arbitration and took no action to repudiate his representation at the First OSC until over two years had passed and Colaneri had received an unfavorable award. Colaneri cannot now ask the court to disregard Orozco's explicit waiver on Colaneri's behalf when Colaneri later retained Orozco in the same case and waited over two years to raise any such objection to Orozco's misrepresentation. Attempting to cure the waiver and explicit representation of counsel as to whom he represented, post-arbitrator decision, would give Colaneri a free pass at arbitration: if I win, it's conclusive; if I lose, I can try again, de novo, in court.

Carrino and Colaneri are also bound to arbitrate under the doctrine of estoppel. Non-signatorys to an arbitration agreement may be compelled to arbitrate based on the doctrines of equitable estoppel and agency. Hirsch v. Amper Financial Services, 215 N.J. 174, 192-193 (2013). "To establish equitable estoppel, parties must prove that an opposing party engaged in conduct, either intentionally or under circumstances that induced reliance, and that [they] acted

or changed their position to their detriment." Id. at 189. "Equitable estoppel is invoked in the interests of justice, morality and common fairness." Id. at 193.

Here, Defendants opposed Plaintiffs' attempt to have this matter heard in New Jersey Superior Court. As stated above, in support of that opposition, Defendants' counsel represented, on behalf of all Defendants, to the court, that Plaintiffs claims against individual parties would be heard and decided in that arbitration. In reliance upon that statement, Plaintiffs spent nearly two years and hundreds thousands of dollars arbitrating this case, while not bringing their individual claims in court. Defendants argue that Plaintiffs were required to arbitrate anyway and cannot differentiate what funds were spent on claims against Brunelleschi and what funds were spent against Colaneri and Carrino. However, it can not be disputed that Plaintiffs were forced to incur greater attorney's fees at arbitration due to the agreement and understanding, based on Orozco's unambiguous representations, that they could bring their individual claims at arbitration. Plaintiffs still had to show a basis of individual liability, beyond corporate liability. Further, in reliance on Orozco's statements, Plaintiffs withdrew their First OSC, abandoned their jury demand, but the venue of the dispute-the forum for those decisions-was arbitration and have not prosecuted their claims in Superior Court. It would be inequitable to force Plaintiffs re-establish their claims de novo in court at this remove.

It is true that Defendants raised an objection during the Arbitration, to arbitration. It is conceded by all that merely proceeding with arbitration after objection does not constitute a waiver of that objection. However, "just as mere participation in the arbitration does not dictate a finding of waiver, mere assertion of an objection does not dictate a finding of non-waiver. In both situations, the determination as to waiver is dependent upon all of the facts relating to the nature and degree of the objecting party's participation in the arbitration proceeding". Highgate

Development Corp. v. Kirsh, 224 N.J. Super. 328, 333 (App. Div. 1988). Here, the Defendants in essence **removed** the case from Superior Court, where Plaintiffs had lodged it, to arbitration, where the Brunelleschi contract mandated it go, upon the express representation that Plaintiffs' individual claims — including contract, fraud and CFA — as against each Defendant – would be heard and decided not in court, but in arbitration. This did not preclude Colaneri or Carrino from being able to argue that he ought not to be individually liable to Plaintiffs. But it does preclude them from successfully arguing that the claims against them were not entrusted to the Arbitrator for decisions on the merits.

**D. The Arbitrator's Award is Rational**

Upon due consideration, the court finds the Arbitrator's did not exceed his powers, nor so imperfectly execute them, that the court should vacate the award, or fail to confirm it. In addition, the Arbitrator can not be fairly said to have awarded on a matter not submitted to him, such as which would empower the court to modify or correct the award. 9 U.S.C. § 10, § 11.

As clarified at oral argument, the category # 1 damages totaling $539,475.00 were derived by the Arbitrator from Plaintiffs' expert's calculation of the costs to complete and remediate the Project ($245,475.00), "plus trebled damages of a portion of remediation costs related to CFA violations", as stated by the Arbitrator in the award. The "portion of remediation costs related to CFA violations" is evidently $147,000.00, as $539,475.00 minus $245,475.00 = $294,000.00. $294,000.00 ÷ 2 = $147,000.00. If one trebles the $147,000.00 portion of the $245,475.00 in completion/remediation damages, one arrives at a total category # 1 award of $539,475.00. In other words, $147,000.00 of the $245,475.00 in damages incurred in remediation and completion of the work was found by the Arbitrator to constitute CFA damages, for which Colaneri and Carrino were each determined to be individually liable.

Defendants vetoed Plaintiffs' request to the Arbitrator for a "reasoned award", as Defendants were entitled to do, but nonetheless the Arbitrator provided the parties and the Court with the means of ascertaining the components of the award attributable to CFA violations, and the Award does not fail for lack of coherence or lack of rationality on that score.

**E. The Individual and Joint and Several Liability of Carrino and Colaneri**

The court finds no basis to vacate the Arbitrator's award of individual liability as against Carrino or against Colaneri, nor any basis to vacate the award of joint and several liability of these Defendants to Plaintiffs. Those aspects of the Award are confirmed.

The issue of whether Brunelleschi Construction, LLC's principal, Carrino and/or its employee Colaneri bound himself to arbitrate his individual liability has been addressed above. Though Carrino did not sign his company's contract in his own name, individually, nor did Colaneri, their counsel bound them to arbitration for the reasons previously set forth.

Did the Arbitrator nonetheless exceed his powers by finding Colaneri individually liable. In the first instance, the issue of whether Carrino and Colaneri were individually liable to Plaintiffs — separate and apart from the liability of the company — is a matter that was properly before the Arbitrator for decision. Colaneri and Carrino retained the right to argue why he should not be made to Answer individually, but the issue was entrusted by them to the Arbitrator, not this court, for decision.

The Arbitrator found personal liability against Carrino and against Colaneri for completion and remediation of the work, and for CFA violations, related damages and attorney fees and costs of arbitration. The Arbitrator was empowered by Carrino and Colaneri to do so. He did not issue a "reasoned award" nor provide any explanation as to why he did so. Plaintiffs sought a "reasoned award" but Defendants objected, so none was rendered. Accordingly, it is no

proper basis in this case to object to an award on an issue entrusted to the Arbitrator for decision, that he did not explain his reasons.

The Consumer Fraud Act does not limit a consumer to recourse against a corporate defendant, or insulate principals, officers or even employees from liability. Corporate officers and employees may be found individually liable pursuant to the CFA for their affirmative acts of misrepresentation to a consumer. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 608-610 (1997).

Likewise, individuals may be independently liable for violations of the CFA, notwithstanding that they were acting through a corporation at the time. New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486 (App. Div. 1985).

Individual liability can not be assessed merely because of the act of the corporate entity. Rather, courts focus on the acts of the individual employee or corporate officers to determine whether the specific individual had engaged in conduct prohibited by the CFA.

The issue presented in Allen v. V and A Bros., Inc. was whether an employee or officer of a corporation may be individually liable under the CFA when the basis for the CFA claim is a regulatory violation rather than an affirmative act or a knowing misrepresentation. 208 N.J. 114, 133 (2011). The issue of individual liability for regulatory violations "ultimately must rest on the language of the particular regulation in issue and the nature of the actions undertaken by the individual defendant". Ibid. A low level employee, for example, can not be fairly assessed with individual liability for, say, using a form contract provided by his employer that uses a font size in violation of regulatory standards.

The record in this case is that Carrino was the company's principal. He dealt directly with the homeowners on this project and made and enforced decisions on the work of the project,

states of completeness of the work and when payment was due. The issue of whether his level of control or level of involvement in the violations of the CFA was of a nature, kind and quality to justify imposition of personal liability was an issue entrusted by Carrino to the Arbitrator for decision, and his decision as to Carrino's individual liability is rational and will not be set aside by this court.

The contract itself is signed by Carrino as contractor. In paragraph # 15 of the contract, "Contractor represents that Anthony Carrino and John Colaneri ('the Cousins") are principals of Brunelleschi Construction...".[1] Carrino dealt directly with the homeowner on the project. He was specifically aware of the homeowner's complaints about the work on the Project and was in communication with the homeowner and with his staff about the homeowner's complaints. The court can not conclude that the record is devoid of evidence supporting individual liability on the contractor, Carrino.

It is true that the Arbitrator did not tie specific regulatory violations to Carrino as distinct from Colaneri. That, too, is a function of the type of award Defendants in unison insisted upon. The award can not be set aside on this basis.

The role of Colaneri is somewhat more obscure. He is listed in the contract as a co-principal with is cousin Carrino, when in fact he is not and never has been a principal of the company. He was for a time the "Senior Project Manager" at the Project. The record contains evidence suggesting that he seriously misrepresented to the homeowners the status of progress on the project, and seriously misrepresented that work on the Project had been done when in fact it had not, that the work has been inspected when in fact it had not, and that the work had been permitted when in fact it had not. There was also evidence presented to the Arbitrator that Colaneri's misrepresentations concealed from the homeowner the nature of the work that the

[1] It is apparently undisputed that in fact Colaneri was never a principal of the company.

Arbitrator found had to be remediated and completed (and which formed the basis of the award in favor of the homeowner of the costs to remediate and complete the work). Lastly, there was evidence presented to the Arbitrator that Colaneri used these misrepresentations to induce payments from the homeowner for the Project.

This is a far cry from a lowly employee being assessed individual liability for the font size on a corporate form.

It is not for this court to decide whether the type, kind and quality of Colaneri's actions justified imposing personal liability upon him. It is sufficient for the court to note that it was not irrational for the Arbitrator to so conclude.

The company, its principal Carrino and its Senior Project Manager presented a uniform affirmative and defensive case in arbitration. There is no suggestion by Carrino that Colaneri was a rouge employee at variance with the established practice and procedures he established for this small company. There was no suggestion to the Arbitrator, by the Defendants, that one but not the other was responsible for particular breaches of contract or violations of the consumer fraud act. While joint and several liability was not specifically spelled out in the arbitration pleadings, there was no objection when Plaintiffs submitted a form of Order to the Arbitrator setting forth joint and several liability. Lastly, on this score, given the evidence before the Arbitrator of the personal involvement of Carrino and Colaneri in the Project, it was not irrational to find both liable, with the company, for the costs of remediation and completion, and for the consumer fraud act violations, the related damages, attorneys' fees and costs of arbitration.

## SUMMARY

Accordingly, the Plaintiffs' application to confirm the Arbitration Award is granted, and the Defendants' motions to vacate the award are denied. Plaintiffs' counsel shall submit a form of Judgment under the Five Day Rule.

ROBERT P. CONTILLO, P.J.CH.