NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0610-13T2

ARKADIUSZ LUKASZEWSKI, DARIUSZ GOCAL, TADEUSZ OGRODNIK, and RYSZARD KLYSINSKI,

Plaintiffs-Appellants,

v.

JASTICON, INC., and MOISTURE MANAGEMENT EXTERIORS, LLC,

Defendants-Respondents.

Argued November 19, 2014 – Decided June 22, 2015

Before Judges Alvarez, Waugh, and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2899-10.

Patrick J. Whalen argued the cause for appellants.

Michael D. Lindner, Jr., argued the cause for respondent Jasticon, Inc. (Lindner Law, LLC, attorneys; David M. DeClement, on the brief).

PER CURIAM

Plaintiffs appeal the Law Division's August 22, 2013 order, as well as earlier interlocutory orders, granting summary judgment to defendants Jasticon, Inc. (Jasticon), and dismissing their claims against Moisture Management Exteriors, LLC

(Moisture Management). We affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

I.

We discern the following facts and procedural history from the record on appeal.[1] Because we are reviewing the grant of a motion for summary judgment, we view the facts in the light most favorable to plaintiffs, the non-moving parties.

Plaintiffs allege that, in early 2010, Piotr Zablocki approached some or all of them with a job opportunity. They contend that Zablocki promised them "that they would be given long-term employment" by Jasticon, specifically for a period of "at least 18 months (perhaps not consecutively, given the nature of the construction industry - - but definitely for a total of at least 18 months)." According to plaintiffs, Zablocki promised that they would work on "big projects," in Cape May and elsewhere in New Jersey. Zablocki further promised them that "they would never run out of work."

They further allege that Zablocki promised Lukaszewski, Gocal, and Ogrodnik, who were bricklayers, an hourly pay rate of

[1] Our task has been made more difficult because Jasticon's brief does not include a detailed statement of facts with citations to the record and plaintiffs' brief does not reflect all relevant dates or the sequence in which certain events took place. See R. 2:6-2(a)(4); 2:6-4(a).

$37.35. That rate consisted of a base rate of $34.35 and an additional $3 per hour to be paid in cash. Klysinski, a laborer, was promised $24 an hour and an additional $1 per hour in cash.

According to plaintiffs, in reliance on Zablocki's promises, Lukaszewski, who had previously operated his own business, canceled his business's insurance policies and purchased a new vehicle. Gocal borrowed $50,000 from family members and canceled workers' compensation and liability policies based on his belief that "he was being hired as an employee."

Gocal, Ogrodnik, and Klysinski began working for Jasticon on or about February 8. Lukaszewski began on or about March 11. Jasticon alleges that Zablocki did not become its employee until February 8, when he was hired as a foreman.

Plaintiffs claim they worked for Jasticon at construction sites including Conifer Village in Cape May, the Medford Senior Housing Project, and Conifer Village in Deptford.[2] Jasticon initially paid Lukaszewski, Gocal, and Ogrodnik $34.35 per hour. They allege that they also received an additional $3 per hour in cash, which they contend stopped when they completed the Cape May project. In March 2010, Gocal and Ogrodnik's pay was

[2] Jasticon denies that they worked in Deptford.

reduced to $25 hourly, while Klysinski's was reduced to $20 hourly for the project in Deptford. After completion of the project in Cape May, plaintiffs were "transferred" to one of Jasticon's subcontractors, Moisture Management, which reduced their pay to $17 hourly.

According to plaintiffs, they repeatedly complained about unsafe working conditions[3] and the changes in their pay. After they informed Zablocki about their pay cuts, he represented that the "old salary terms and conditions of their employment would be reinstated." It is unclear from the record whether their pay was actually adjusted. Plaintiffs allege that Jasticon threatened to terminate them as a result of the complaints.

Plaintiffs contend that they complained to the United States Department of Labor (USDOL) that Jasticon paid them below the federal prevailing wage. In any event, USDOL audited Jasticon, and found that it underpaid Gocal, Ogrodnik, and Lukaszewski. As a result, USDOL required Jasticon to provide plaintiffs with back pay.

In the late summer of 2010, Jasticon terminated plaintiffs, alleging that there was no work for them. However, plaintiffs allege that Jasticon "continued to engage in projects that

[3] The substance of their safety concern involved the fact that they had to set up scaffolding, although they were never trained to do so.

involve masonry work and general laborers," some of which also involved bricklayers. According to plaintiffs, Zablocki contacted them in mid-September,[4] after they had been terminated, and warned them that, if they did not stop calling the New Jersey Department of Labor, they would not receive the unpaid wages and overtime.

On November 8, plaintiffs filed an eight-count complaint seeking damages of "back pay, front pay, benefits, and other remuneration with interest," in addition to compensatory and punitive damages, and attorney's fees. The complaint contained the following causes of action, each in a separate count: (1) violations of the New Jersey State Prevailing Wage Act, N.J.S.A. 34:11-56.25 to -56.47; (2) retaliation based on their complaints about wages; (3) violation of N.J.S.A. 34:11-56(a)(4) with respect to overtime; (4) violation of the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -18; (5) breach of an implied employment contract; (6) breach of the implied covenant of good faith and fair dealing; (7) promissory estoppel; and (8) a common law claim under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71 (1980).

[4] Zablocki returned to Poland and was not available during discovery. According to Jasticon, Zablocki no longer worked for them as of August 2010.

On November 1, 2012, Jasticon moved to dismiss counts five, six, seven, and eight.[5] Jasticon admitted that plaintiffs had been its "at-will employees," but asserted that "[a]t the end of available work," their services were no longer needed. Jasticon also asserted that Zablocki "did not have any authority, implied or expressed, to act on behalf of the corporation."

In support of its motion to dismiss, Jasticon submitted two certifications, one by Steven Hotz, its sole principal, and the other by Diane Russell, its manager. Both were one-page documents with the following identical language:

> I had no intention nor have had any interaction with the Plaintiffs as to their work nor did I ever even meet them prior to their beginning work at Jasticon.
>
> I have no information as to why the Plaintiffs allege they were promised work as no one . . . [with] any authority promised them any work.
>
> They were at-will, hourly employees for which no promise of work was ever extended either orally or written.
>
> I did not know these [workers] except to give them a pay check. The allegations of someone promising the work [are] false.
>
> Furthermore I have never heard of or had any personal knowledge of any allegation of improper or unsafe work practices at our firm from any of the Plaintiffs.

[5] At that time, the parties had engaged in paper discovery, but no depositions were ever taken.

Plaintiffs opposed the motion, relying primarily on the facts set forth in their individual answers to interrogatories, many of which contained the same responses.

After hearing oral argument on January 11, 2013, the motion judge placed an oral decision on the record. She observed that the central issue of the motion was Zablocki's alleged promise to the plaintiffs that they would have a job for eighteen months. She observed that Zablocki could bind Jasticon to an eighteen-month obligation to employ plaintiffs only if he had the authority to do so. The judge held that, giving plaintiffs the benefit of all inferences, Zablocki had "actual authority to hire people," because he had hired the four plaintiffs to work for Jasticon.

However, the judge also noted that "the scope of [Zablocki's] authority," according to "defendant[,] was to hire people on a per-job basis." She found "no evidence, no credible evidence" that Zablocki's authority extended beyond that. She characterized plaintiffs' understanding that he had authority to hire for a specific term, in this case for eighteen months, as "just [plaintiffs'] understanding of it . . . . We don't have anything from anybody at Jasticon saying yes, we gave him authority to hire people for 18 months. In fact they say the opposite."

The judge explained that, under Shadel v. Shell Oil Co., 195 N.J. Super. 311, 314 (Law Div. 1984), "apparent authority" requires action by the principal that has "misled a third party into believing that a relationship of authority does in fact exist." She found that Jasticon itself had done nothing to suggest that Zablocki had authority to do more than hire. Consequently, she found no apparent authority to hire for a specific term of employment as opposed to hiring as an at-will employee.

The judge entered an order granting summary judgment and dismissing counts five, six, seven, and eight. However, in a hand-written modification to the typed order, the judge added that counts six and eight were only dismissed to the extent they alleged breach of the alleged eighteen-month employment contract.

Jasticon filed a motion for clarification, which plaintiffs opposed. Plaintiffs filed a cross-motion for reconsideration. On April 24, the judge entered an order denying reconsideration. The order clarified that any relief under counts five, six, and seven would be provided based not on Zablocki's promise of work, but instead only on the time period between when plaintiffs were terminated and the completions of "said project." However, the judge never specified to which project she was referring. The

order further provided (1) that plaintiffs were voluntarily dismissing count three, the overtime count, as to Jasticon only, and count eight, the Pierce count, as to all parties, (2) that counts two and four "remain in their entirety," and (3) that plaintiffs were dismissing their claims for unpaid wages under the federal prevailing-wage law, but not their claims based on State law. Plaintiffs also dismissed count one after the federal audit of Jasticon revealed that it failed to pay plaintiffs the prevailing wage under the federally-mandated pay scale, and awarded them back pay for the Cape May and Medford projects.

On August 22, the judge held a case management conference at which she discussed plaintiffs' CEPA claim in light of her prior rulings. She concluded that, by finding that Jasticon did not have a contractual or quasi-contractual obligation to employ plaintiffs for eighteen months, her prior ruling limited the period during which plaintiffs could recover front pay on their CEPA claim. Counsel for plaintiffs responded that, because they could not recover damages for an eighteen-month period, "[t]here is nothing else to try. There are no damages left on the CEPA claim." The judge responded that she could "envision a project-by-project type of situation" under which the plaintiffs could recover for intermittent work that they could have received

after their termination, although they were at-will employees. Plaintiffs' counsel nevertheless voluntarily dismissed his CEPA claim, based on the judge's limit to the eighteen-month period. The judge accepted the voluntary dismissal without further discussion. The judge also dismissed the claims against Moisture Management, essentially for failure to prosecute. This appeal followed.

II.

Appellants raise the following issues:

> I. RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO THE IMPLIED CONTRACT, GOOD FAITH & FAIR DEALING, AND PROMISSORY ESTOPPEL CLAIMS (COUNTS V, VI, AND VII) SHOULD HAVE BEEN DENIED, AS THERE WERE MATERIAL FACTUAL ISSUES IN DISPUTE SURROUNDING THIS ISSUE.
>
> A. Implied Employment Contract Claim.
>
> B. Promissory Estoppel Claims.
>
> II. THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT ("CEPA") CLAIMS SHOULD NOT HAVE BEEN DISMISSED.

We review a grant of summary judgment under the same standard as the motion judge. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). We must determine whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the non-moving party. Id. at 38, 41. "The inquiry is 'whether the evidence presents a sufficient

disagreement to require submission to a [finder of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). "[T]he legal conclusions undergirding the summary judgment motion itself" are reviewed "on a plenary de novo basis." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

The basic issue presented on this appeal is whether plaintiffs presented sufficient evidence to support that they were hired by Jasticon for a period of eighteen months to survive a motion for summary judgement. They argue that their assertions of fact, found in the answers to interrogatories, were sufficient because there is at least a genuine issue of material fact as to whether Zablocki had authority to hire them for that period of time.

An agency relationship is formed when a principal company directs an agent to act on its behalf. Sears Mortg. Corp. v. Rose, 134 N.J. 326, 337 (1993). The authority to act on behalf of an agent falls into two categories: actual authority and apparent authority. Ibid.

"Actual authority (express or implied) may 'be created by written or spoken words or other conduct of the principal which,

reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.'" Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005) (quoting Restatement (Second) of Agency § 26 (1958)). Plaintiffs' argument relies upon the doctrine of apparent authority. As the Supreme Court held in New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guaranty Co., 203 N.J. 208, 220 (2010),

> [a]n agency relationship is created "when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006) (internal quotation marks omitted). Generally, an agent may only bind his principal for such acts that "are within his actual or apparent authority." Carlson v. Hannah, 6 N.J. 202, 212 (1951) (citation omitted). Actual authority occurs "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency, supra, § 2.01.

Actual authority is based on the actions of the principal or the reasonable belief of the agent.

In contrast, apparent authority is based on the reasonable belief of the third party seeking to bind the principal on the

basis of the acts of the agent, but requires some verification by the principal.

> 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." Id. § 2.03. The doctrine of apparent authority "focuses on the reasonable expectations of third parties with whom an agent deals." Id. § 7.08 comment b.
>
> [N.J. Lawyers' Fund, supra, 203 N.J. at 220.]

Apparent authority applies when proofs show:

> 1) conduct by the principal that would lead a person to reasonably believe that another person acts on the principal's behalf -- i.e., conduct by the principal 'holding out' that person as its agent; and 2) acceptance of the agent's service by one who reasonably believes it is rendered on behalf of the principal.
>
> [Estate of Cordero ex rel. Cordero v. Christ Hosp., 403 N.J. Super. 306, 315 (App. Div. 2008).]

Application of the doctrine is intended to prevent "a principal from 'choos[ing] to act through agents whom it has clothed with the trappings of authority and then determin[ing] at a later time whether the consequences of their acts offer an advantage.'" Id. at 312 (quoting Restatement (Third) of Agency, supra, § 2.03 comment c).

We agree with the trial judge that there is no evidence that Zablocki had actual authority, whether express or implied, to hire plaintiffs as anything more than at-will employees. There are no documents demonstrating such authority. Moreover, Jasticon's principal and manager certified that Zablocki had no such authority and was not even its employee when the plaintiffs were hired, and there are no sworn statements from Zablocki asserting that he was given authority to hire for a period of time beyond a specific job.

We consider it a fair conclusion for the purposes of this motion that Zablocki had a limited degree of apparent authority because, according to plaintiffs, he offered plaintiffs employment and they did work for and were paid by Jasticon. There is nothing in the record to demonstrate that anyone else hired the plaintiffs on Jasticon's behalf. Indeed, in response to plaintiffs' interrogatory eighteen, Jasticon concedes that Zablocki hired plaintiffs, but only as at-will employees.

However, we see no genuine issue of material fact on the issue of whether Zablocki had apparent authority to hire plaintiffs for a fixed period of time, as opposed to at-will employment. The plaintiffs' factual assertions on the issue of their hiring for eighteen months are simply inadequate in the context of a motion for summary judgment. Many, if not most, of

their assertions are made in the passive voice, stating only that they were hired by Jasticon for a specific period without stating by whom. For example, Gocal's March 13, 2013 certification states at paragraph 2: "In early 2010, I was hired by . . . Jasticon . . . to perform services on various construction projects, which were located throughout New Jersey. I was promised 18 months of employment." There is no assertion that he was promised a period of employment by Zablocki or any other specific person. A similar assertion is made in Gocal's answer to interrogatory sixteen, in which the passive voice is used concerning hiring and the eighteen-month promise.

> Prior to being hired, Plaintiffs were told - - promised - - that they would be given long-term employment and that Jasticon had a lot of work for each of them. It was understood, and relied upon by Plaintiffs, that Jasticon would employ them for at least 18 months (perhaps not consecutively, given the nature of the construction industry - - but definitely for a total of at least 18 months).

The answer further alleges that Zablocki went to Klysinski's home and promised that they would be working "on big projects and that they would 'never run out of work,'" but makes no mention of a specific eighteen-month promise by Zablocki. Similarly imprecise and passive-voice factual assertions were also made by the other plaintiffs.

Even if plaintiffs had clearly and consistently asserted that Zablocki had specifically promised them employment for eighteen months, we would still find no basis in the record to conclude that there is a genuine issue of fact as to that issue. There is nothing in the record establishing that Jasticon engaged in conduct that would reasonably have led plaintiffs to believe that Zablocki had authority to hire them as anything more than at-will employees, regardless of the promises he may have made. Cordero, supra, 403 N.J. Super. at 315.

We now turn to plaintiffs' CEPA claims. It appears that plaintiffs' CEPA claims were dismissed because their attorney understood the judge to conclude that plaintiffs' front-pay damages would be limited to the project on which they were working at the time of their termination. Although the judge's comments could be interpreted differently, we disagree that plaintiffs' damages would necessarily have been so limited. As we held in Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 128-29 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003),

> [i]t is well-settled that the "law abhors damages based on mere speculation." Caldwell v. Haynes, 136 N.J. 422, 442 (1994) (citation omitted). However, "[d]amages need not be proved with precision where that is impractical or impossible." Borough of Fort Lee v. Banque National de Paris, 311 N.J. Super. 280, 291 (App. Div. 1998) (citation omitted). Moreover, "[w]here a wrong has been committed, and it is certain

> that damages have resulted, mere uncertainty as to the amount will not preclude recovery--courts will fashion a remedy even though the proof on damages is inexact." Kozlowski v. Kozlowski, 80 N.J. 378, 388 (1979) (citations omitted). See also Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420 (App. Div. 1987) (damages should be proved with "such certainty as the nature of the case may permit, laying a foundation which will enable the trier of facts to make a fair and reasonable estimate").

Although Jasticon argues that plaintiffs were terminated because there was no work, it conceded, in defense counsel's November 1, 2012 letter to plaintiffs' counsel, that Jasticon "[o]bviously . . . has continued to engage in projects that involve masonry work and general laborers. Some may have even involved brick layers." That concession, plus the fact that plaintiffs had been assigned to more than one project by Jasticon, suggests that, if plaintiffs prove that their termination was a CEPA violation, a jury could reasonably find that they could have continued to work on available Jasticon projects. As the Supreme Court has held, the courts can "fashion a remedy even though the proof on damages is inexact." Kozlowski, supra, 80 N.J. at 388.

"[CEPA's] purpose is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Abbamont v. Piscataway Twp. Bd. of Educ., 138

N.J. 405, 431 (1994). In Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003) (quoting Abbamont, supra, 138 N.J. at 431), the Supreme Court reiterated that it had "long . . . recognized that CEPA is remedial legislation and therefore 'should be construed liberally to effectuate its important social goal.'"

CEPA provides, in relevant part, that

> [a]n employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> > a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
> >
> > (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
> >
> > (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor,

client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . .;

(2) is fraudulent or criminal . . . ; or

(3) is incompatible with a clear mandate of public policy concerning the public health,

> safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3.]

A valid CEPA claim has four requirements: (1) the employee "reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation . . . , or a clear mandate of public policy"; (2) the employee "performed a 'whistle-blowing' activity" specified in N.J.S.A. 34:19-3(c); (3) the employer took "an adverse employment action" against the employee; and (4) "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar, supra, 177 N.J. at 462.

We are satisfied that there are sufficient facts in the current record, albeit contested, that, when viewed in the light most favorable to plaintiffs, support a CEPA claim with respect to plaintiffs' complaints about the safety of their working conditions and violations of federal and state prevailing-wage laws. For example, plaintiffs contend that they complained to USDOL about a prevailing-wage violation. On September 16, 2010, plaintiffs Lukaszewski, Gocal, and Ogrodnik were notified by Jasticon that the USDOL had determined that they had not been paid the correct rate on jobs in Cape May and Medford and that they would receive checks to correct the underpayment. That

decision by USDOL was made within the same time frame as Jasticon's decision to terminate them.

For the reasons outlined above, we affirm the order dismissing counts five, six, and seven, all of which are premised on the existence of a contract, express or implied, for employment for eighteen months. We agree with the judge that plaintiffs were at-will employees who have no contract claim.

As explained above, plaintiffs can seek damages for front pay beyond a single project should they prevail on their CEPA claim. Therefore, we reverse the dismissal of count four, which contains the CEPA claim. Count two is duplicative of count four and remains dismissed for that reason. Counts three and eight were voluntarily dismissed by plaintiffs. Pursuant to paragraph five of the April 24, 2013 order, count one is reinstated, inasmuch as it involves a claim under this State's prevailing-wage law.[6]

Affirmed in part, reversed and remanded in part.

[6] Plaintiffs' legal arguments did not address the claims against Moisture Management, although the preliminary sections of their brief suggest they should not have been dismissed. Our reading of the record supports the judge's view that plaintiffs were dilatory in pursuing those claims. Consequently, we find no basis to reinstate them.