NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

FIRST AMERICAN TITLE INSURANCE COMPANY,	:	SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY DOCKET NO.: ESX-L-4539-17
Plaintiff,	:	
v.	:	
ADENAH BAYOH	:	
Defendant.	:	**DECISION**

DECIDED NOVEMBER 3, 2017
STEPHANIE A. MITTERHOFF, J.S.C.

John A. Fialcowitz, Esq.
Attorney for Defendant Adenah Bayoh

Joseph M. Bimonte, Esq,
Attorney for Plaintiff First American Title Insurance Co,

I. INTRODUCTION

This matter comes before the court on Defendant Adenah Bayoh's (Bayoh or Defendant) Motion to Dismiss the Complaint brought by Plaintiff, First American Title Insurance Company (First American or Plaintiff) pursuant to R. 4:6-2(e). The action arises from an Affidavit of Title that non-party Adekunle Alli (Alli) provided to non-parties Rigatoni Realty Corp., Larry Schwartz, Donald Lipeles and Mark Morales (collectively the Rigatoni non-parties) in 2007, and Alli's

subsequent transfer in 2009 of the mortgaged property to non-party Midgrove Properties, LLC (Midgrove). In the underlying action Plaintiff is seeking damages under causes of action for common law fraud, fraudulent conveyance, breach of fiduciary duty, negligence, unjust enrichment, breach of contract, and breach of the implied covenant of good faith and fair dealing. Plaintiff also seeks to hold Defendant personally liable by piercing the veil of all corporations or limited liability companies in which she is a member.

Defendant alleges that Plaintiff's claims against Bayoh must fail for several reasons. First, Defendant alleges that the fraud cause of action should be dismissed because the Complaint does not allege either that Bayoh provided the allegedly fraudulent Affidavit of Title to First American or specify how or when she assisted Alli in providing it. Second, Defendant contends that the fraudulent conveyance cause of action is time barred. Third, Defendant claims that the contract-based causes of action in Counts VI and VII should be dismissed because neither Bayoh nor Midgrove were parties to the contracts alleged in the Complaint. Fourth, Defendant contends that the causes of action for breach of fiduciary duty and negligence in Counts III and IV are time barred. Fifth, Defendant asserts that Count V alleging a claim for unjust enrichment fails to state a claim because it does not allege that First American expected compensation from Bayoh at the time it issued its policy of title insurance. Finally, Defendant asserts that the claim for piercing the corporate veil must be dismissed because the allegedly fraudulent conveyance claim is time barred.

For the reasons set forth below, Defendant's Motion to Dismiss as to all Counts is Granted.

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II. STATEMENT OF FACTS

On or about May 4, 2007, non-party Alli executed a note to non-party Bank of America for $150,000.00. To secure payment for the note, Alli granted Bank of America a mortgage on 506 Central Avenue, Newark, New Jersey (the Central Avenue Property). On or about May 24, 2007, Bank of America recorded the mortgage in the Essex County Clerk's Office in Mortgage Book 12057, Page 7242.

Om July 26, 2007, Alli granted a mortgage on the Central Avenue Property to the Rigatoni non-parties. First American contends that in connection with the second mortgage, Alli executed an Affidavit of Title attesting that "no liens and/or mortgages existed for the Property, but for the liens and/or mortgages that were being paid off as a result of monies received in exchange for the mortgage received on July 26, 2007." Pl.'s Comp. at ¶ 12. First American alleges that it relied on Alli's representation when it issued a policy of mortgage title insurance to the Rigatoni non-parties. Unbeknownst to Plaintiff, and not disclosed in public records, the representation made by Alli in the affidavit apparently was false. Pl.'s Comp. at ¶ 14.

By deed dated June 24, 2009, Alli conveyed all of his interests in the Central Avenue Property to Midgrove for $100.00. Cert. John Fialcowitz at Ex. 5. First American alleges that Defendant Bayoh "notarized the Deed and was thus aware of the transaction and/or participated in it." Pl.'s Comp. at ¶ 15. On the same day—June 24, 2009 --- Alli recorded the deed in the Essex County Clerk's Office in Mortgage Book 12201, Page 9472. First American alleges that "due to the business relationship between [Bayoh and Alli] it is clear, beyond peradventure, that [Bayoh] was actually, vicariously, and/or constructively aware of the Rigatoni Mortgage and transaction, participated in the transaction and/or derived benefit, gain, or advantage therefrom."

The transfer of the Property was performed without the knowledge or consent of Plaintiff or the Rigatoni Parties. Pl.'s Comp. at ¶ 23. Alli passed away in February 2011. Id. at ¶ 27.

On or before November 10, 2010, after Alli defaulted on his payments, Bank of America elected to accelerate the whole unpaid principal sum and unpaid interest and advances on its Mortgage and Note and to foreclose on the Central Avenue Property. Cert. John Fialcowitz at Ex. 5. The foreclosure complaint named the Rigatoni non-parties as defendants as a result of the Rigatoni Mortgage that Alli had granted on the Central Avenue Property.

After learning about the transfer of the Central Avenue Property to Midgrove, and the Bank of America mortgage on the Property, the Rigatoni Parties filed a claim with First American. Pl.'s Comp. at ¶¶ 24-25. Plaintiff purchased the Bank of America mortgage and took an assignment pursuant to its insurance obligations on March 31, 2012. Cert. John Fialcowitz at Ex. 6. Plaintiff subordinated the Bank of America mortgage placing the Rigatoni Parties in first lien position as its insured. Pl.'s Comp. at ¶¶ 25-26. On May 23, 2012 Bank of America assigned its mortgage and note to First American. Mr. Curcio, the same attorney who represented the Rigatoni defendants in the foreclosure action and asserted cross-claims on their behalf against Alli and Midgrove sounding in fraud, prepared and recorded the assignment on behalf of First American. Mr. Curcio then obtained an Order dismissing the Bank of America foreclosure action without prejudice.

During litigation instituted by the Estate of Alli in fall 2012, Plaintiff became aware that Alli and Defendant were business partners, each with an equal ownership interest in Midgrove. Pl.'s Comp. at ¶¶ 18; 22. After Alli's death, Defendant continued managing and operating the Property. Id. at ¶ 27. Plaintiff alleges that Defendant failed to pay taxes on the Property, diverted rental incomes to herself, commingled funds, and failed to pay off other debts related to the

Property. Id. at ¶ 24, 28. The Property was sold in November 2014 and Plaintiff claims to have been substantially and irreparably harmed as a result of Defendant's mismanagement and being subordinate to the Rigatoni Mortgage. Plaintiff is now seeking relief in order to be made whole. Id. at ¶¶ 24, 28, 29, 31.

Based on the alleged conduct of Defendant, Plaintiff filed this Complaint on June 26, 2017, asserting eight causes of action for: (1) common law fraud; (2) fraudulent conveyance; (3) breach of fiduciary duty; (4) negligence; (5) unjust enrichment; (6) breach of contract; (7) breach of the implied covenant of good faith and fair dealing; and (8) piercing the veil of any and all corporations or limited liability companies. In lieu of answering Plaintiff's Complaint, Defendant filed a motion to dismiss all claims on August 24, 2017.

III. STANDARD OF REVIEW

Motions to dismiss should be granted in "only the rarest [of] instances." Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). The complaint should be searched "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart, supra 116 N.J. at 746. See also Glass, Molders, Pottery, Plastics, & Allied Workers Int'l Union v. Wickes Cos., 243 N.J. Super. 44, 46 (Law Div. 1990) ("The test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts."). Courts must "assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). However, a motion to dismiss "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal

requisites for plaintiff's claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003). We treat Plaintiff's version of the facts as uncontradicted and grant it all legitimate inferences.

In its review, a court also "may consider documents specifically referenced in the complaint without converting the motion into one for summary judgment." Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (in evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Banco Popular N. Am. v. Gandhi, 184 N.J. 161, 183 (2005).

IV. DISCUSSION

1. Common Law Fraud (Count I)

First American claims that non-party Alli falsely "executed an Affidavit of Title attesting that no liens and/mortgages existed for the [Central Avenue] Property, but for the liens and/or mortgages that were being satisfied and paid off as a result of monies received in exchange for the mortgage received on July 26, 2007 i.e. the Bank of America Mortgage." Comp. at ¶¶ 13-14. There is no allegation in the Complaint that Bayoh herself made any representations to First American, nor is there any specification as to how she substantially assisted Alli with the allegedly false Affidavit of Title.

To state a claim for common law fraud, plaintiff must show: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

The New Jersey Supreme Court has described fraud as one gaining an undue advantage through the means of an act or omission that is either "unconscientious or a violation of good faith." Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624 (1981).

In addition, to state claim for aiding and abetting fraud, a plaintiff must plead the following elements:

> (1) The party whom the defendant assists must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of an overall illegal or tortious activity at the time; (3) the defendant must knowingly and substantially assist the principal violation.
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> State Dep't of Treasury, Div. of Inv. ex. rel. McCormac v. Qwest Commc'ns Int'l, Inc., 387 N.J. Super. 469, 484 (App. Div. 2006) (internal quotation and citations omitted).

Fraud is never presumed. Albright v. Burns, 206 N.J. Super. 625, 636 (Super. Ct. App. Div. 1986). A complaint sounding in either fraud or aiding and abetting fraud, "must, on its face, satisfy the requirements of Rule 4:5-8." Id. A court should dismiss a complaint alleging fraud if "the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 315 (App. Div. 1999). Further, R. 4:5-8(a) requires that any complaint alleging fraud present "particulars of the wrong, with dates and times if necessary, . . . insofar as practicable." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009).

In this case, non-party Alli applied for, and was granted, mortgages from both Bank of America and the Rigatoni Parties on the Property. Both applications were made in his individual capacity. Cert. John Fialcowitz. at Ex. 2, Ex. 3. Similarly, Alli's allegedly false Affidavit relied upon by Plaintiff in issuing the title insurance policy on the Property was executed in his individual capacity. Pl's Comp. at ¶ 12. Nowhere in Plaintiff's complaint does First American allege that Bayoh either made any misrepresentations to its employees or provide any facts as to how she

substantially assisted Alli in creating the allegedly false Affidavit of Title. Plaintiff relies solely on the fact that at all relevant time periods, Defendant was Alli's business partner. Pl.'s Comp. at ¶¶ 18; 22. Plaintiff is relying on this unique position between Defendant and Alli, and her position within Midgrove, in asserting that Defendant had presumed knowledge of Alli's misrepresentation of the Bank of America mortgage to the Rigatoni Parties, and should therefore be directly, derivatively, constructively, and/or vicariously liable for Alli's fraud. Id. ¶ 33, 36-37; Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss at p. 7. In that regard, the only specific factual allegation pertaining to Defendant is her notarization of the deed transferring the Property to Midgrove.

Plaintiff's attempt to conflate Alli's fraudulent misrepresentation in 2007 with the transfer of the Property to Midgrove in 2009 is unavailing, as Plaintiff has failed to surpass the specificity bar. Specifically, Plaintiff has failed to state with sufficient facts to support that Defendant herself engaged in fraudulent behavior, or even that she knew of Alli's fraudulent behavior in 2007. Here, Plaintiff merely alleges that Defendant witnessed and notarized the deed of transfer of the property at issue. Pl.'s Comp. at ¶¶ 41-42. Second, Plaintiff alleges that Defendant had an equal ownership interest in the property. Id. at ¶¶ 18, 22. These allegations, as stated, are insufficient to support the notion that Defendant, in her unique position as co-owner of Midgrove and Alli's business partner, knew of the original fraud perpetrated by Alli. This a presumption of fraud as prohibited by Albright v. Burns, supra 206 N.J. Super. at 636. The allegations as stated fail to satisfy the elements of fraud. Accordingly, the claim for common law fraud and aiding and abetting fraud must be dismissed. See Levinson, supra, 320 N.J. Super. at 315.

2. Fraudulent Conveyance (Count II)

In Count II, Plaintiff alleges that Defendant "committed further fraud against First American and its insureds by way of the transfer of title to the [Central Avenue Property]," and

participated in fraudulently transferring the Property to Midgrove on June 24, 2009, by witnessing and notarizing Alli's execution of the 2009 Deed. Pl.'s Comp. at ¶¶ 41-42; Cert. John Fialcowitz at Ex. 4.

New Jersey's Uniform Fraudulent Transfer Act ("UFTA") allows creditors to seek property, even after the debtor has transferred the property, if inadequate consideration is given or the transfer is made to defraud the creditor. See N.J.S.A. 25:2-20 et seq. For real property, a transfer occurs on the date the property is recorded. N.J.S.A. 25:2-28(a)(1); Boardwalk Regency Corp. v. Burd, 262 N.J. Super. 162, 165 (App. Div. 1993). According to the Complaint, the Property was transferred on June 24, 2009. Id. at Ex. 4. Pursuant to N.J.S.A. 25:2-31, the statute of limitations for bringing a cause of action with respect to a fraudulent transfer is four years. N.J.S.A. 25:2-31(a) gives Plaintiff an additional one year to file a cause of action, if the Plaintiff discovered the transfer after the four-year window.

The Complaint clearly sets forth the chronology of events. By deed dated June 24, 2009, Alli conveyed all of his interests in the Central Avenue Property to Midgrove for $100.00. Cert. John Fialcowitz at Ex. 5. First American alleges that Defendant Bayoh "notarized the Deed and was thus aware of the transaction and/or participated in it." Pl.'s Comp. at ¶ 15. On the same day—June 24, 2009 --- Alli recorded the deed in the Essex County Clerk's Office in Mortgage Book 12201, Page 9472. Plaintiff alleges that it only became aware of the transfer in connection with the Bank of America mortgage litigation in Fall 2012. Pl.'s Comp. at ¶¶ 18, 22. First American, however, as the assignee of Bank of America, is chargeable with knowledge of the recorded deed because it simply moved into the shoes of the assignor, here, Bank of America. Medtronic AVBF, Inc. v. Advanced Cardiovascular Systems, Inc. 247 F.3d 44, 60 (3d Cir. 2001); The Palisades at Fort Lee Condominium Assoc. v. 199 Old Palisade, LLC, --- A. 3d ---, 2017 WL

4051812 (Sept. 14, 2017) (finding that "a subsequent owner will stand in the shoes of a prior owner for statute-of-limitations purposes.") Thus, neither the one-year tolling provision nor the discovery rule can save the fraudulent transfer claim. Moreover, the time for Plaintiff to file expired four years on June 24, 2013. See N.J.S.A. 25:2-31(a). The four-year window had thus not expired at the time of Plaintiff's discovery. As eight years have passed since the transfer of property occurred, and discovery of the transfer was made by Plaintiff within the statutory four-year window, Plaintiff's claim for fraudulent conveyance is time-barred and Count II is therefore dismissed with prejudice.

3. Breach of Contract (Count VI)

In Count VI, Plaintiff alleges that Defendant, as a result of her unique position as Alli's business partner, was in a contractual relationship with Plaintiff at the time Alli obtained a mortgage from the Rigatoni Parties and Plaintiff issued a title insurance policy to the Rigatoni Parties for the Property in 2007. Pl.'s Comp. at ¶¶ 60-62.

To state a claim for breach of contract under New Jersey law, plaintiff must allege: (1) the existence of a valid contract between itself and defendant; (2) that the defendant materially breached the contract; and (3) the plaintiff suffered damages as a result of the breach. Coyle v. Englander's, 199 N.J. Super. 212, 219-21 (App. Div. 1985). A court must attempt to ascertain the intention of the parties through the language and situation of the parties, the circumstances surrounding the contract, and the goal that the parties wanted to attain. See Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 184 (1981).

In this case, Defendant was not identified as one of the contracting parties on the Rigatoni Mortgage, Cert. John Fialcowitz; Ex. 3. Rather, the contract clearly identifies the contracting parties as non-party Alli and the Rigatoni non-parties:

This mortgage is made on July 26, 2007
BETWEEN, Adekunle Alli, unmarried
Whose post address is 10 Melbourn Lane, Edison,
New Jersey 08837
Referred to as the "Borrower(s)".
AND
Rigatoni Realty Corp., a New York Corporation, Larry Schwartz, Donald Lipeles and Mark Morales
whose post office address is c/o LaTorraco & Christian, s95 Montgomery Street, Bloomfield, New Jersey 07003,
Referred to as the "Lender."

Likewise, the Bank of America mortgage ran solely between Alli and Bank of America:

(B) "Borrower" is ADEKUNLE ALLI
The party or parties who have signed this Security Instrument
Borrower is the Mortgagor under this Security Instrument

(C) "Lender" is Bank of America, N.A.

Thus, as the Bank of America and Rigatoni mortgages run solely between those entities and Alli, First American's breach of contract claims fail as a matter of law. Specifically, pursuant to Coyle, supra, 199 N.J. Super. at 219-21, Plaintiff's complaint does not satisfy the element of a contract claims as there is no valid contract between the parties.

Plaintiff alleged in the Complaint that Defendant and Alli were business partners with equal ownership interest in Midgrove and Defendant is therefore vicariously liable for Alli's acts. Plaintiff's Complaint ¶¶ 18, 22. The court finds this argument unpersuasive. As indicated, Alli entered into the mortgage agreement is his individual capacity and not on behalf of Midgrove. Plaintiff's allegation that Defendant was Alli's partner and is therefore responsible for Alli's fraudulent acts is unavailing. In that regard, it is well settled that a partnership can only be liable for the wrongful acts of a partner if that partner was "acting in the ordinary course of business of the partnership or with the authority of the partnership." N.J.S.A. 42:1A-13. There are no facts alleged to show that Alli was acting in the ordinary course of the alleged partnership when he

sought a mortgage from the Rigatoni non-parties or when he provided the allegedly false Affidavit of Title to First American. Therefore, there are no facts to support the imposition of partnership liability in this case. Accordingly, Count VI is dismissed with prejudice.

4. Breach of Implied Covenant of Good Faith and Fair Dealing (Count VII)

In Count VII, Plaintiff alleges that Defendant violated the covenant of good faith and fair dealing. To succeed on a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must prove: (1) a contract exists between the plaintiff and the defendant; (2) the plaintiff performed under the terms of the contract unless excused; (3) the defendant engaged in conduct, apart from its contractual obligations, without good faith and for the purpose of depriving the plaintiff of the rights and benefits under the contract; and (4) the defendant's conduct caused the plaintiff to suffer injury, damage, loss, or harm. Wong v. Wells Fargo Bank N.A., 2015 WL 6164036, at *4.

"[E]very contract in New Jersey contains an implied covenant of good faith and fair dealing." Sons of Thunder, Inc. v. Borden, Inc. 148 N.J. 396, 420 (1997). Good faith and fair dealing "obligates both parties in a contract to take such actions, which . . . are necessary to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." Id. at 418. Where there is no contract, there can be no breach of the implied covenant of good faith and fair dealing. Wade v. Kessler Institute, 343 N.J. Super. 338, 345 (App. Div. 2001) (quoting Noye v. Hoffman-LaRoche, Inc. 238 N.J. Super. 430, 434 (App. Div. 1990).

As stated above, the court has found that no contract exists between Plaintiff and Defendant. Thus, pursuant to Wade, supra, 343 N.J. Super. at 345, there can be no claim for a

breach of the implied covenant of good faith and fair dealing. For that reason, Count VII is dismissed.

5. Unjust Enrichment (Count V)

In Count V, Plaintiff alleges that Defendant has been unjustly and inequitably enriched by receiving substantial monetary benefits from Plaintiff and retaining these benefits without full repayment. Pl.'s Comp. at ¶¶ 58-59.

To state a claim for unjust enrichment under New Jersey law, a plaintiff must allege: (1) that defendant has received a benefit from the plaintiff; and (2) that the retention of that benefit without payment would be unjust. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 544 (1994). Unjust enrichment is a form of quasi-contractual liability that only exists when a party has received a benefit that would be inequitable for the party to retain. Id. In addition, Plaintiff must show that "it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual right." Iliadis v. Wal-Mart Stores, Inc., 135 N.J. 539, 554 (1994). Plaintiff is "not entitled to employ the legal fiction of quasi-contract to substitute one promisor or debtor for another" except where it may be concluded that Defendant is the proper party to the action based on an implied contract. See Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109-110 (App. Div. 1996); State v. Cherry Hill Mitsubishi, 439 N.J. Super. 462, 471 (App. Div. 2015).

In Callano, supra, the defendant sold a home to a decedent who ordered shrubbery from the plaintiffs to be placed on the property. The shrubbery was placed on the property but the decedent died before payment was made to the plaintiffs. The defendant sold the home with the shrubbery on the property. The plaintiffs then sued the defendant for unjust enrichment received

from the increase in the value to the property because of the shrubbery. The court stated that plaintiffs had no cause of action against defendant for unjust enrichment. To receive value for the shrubbery, the appellate court said that the plaintiffs had no dealings with defendant and did not expect remuneration from the defendants when they provided the shrubbery. The court noted that there was no issue of mistake and thus the proper course of action was to sue decedent's estate.

The facts at bar are similar to those in Callano. An express contract existed between Plaintiff and Alli. Defendant is alleged to have been unjustly enriched from her mismanagement of the property after Midgrove purchased the property from Alli for $100. As in Callano, Plaintiff had no direct dealings with Defendant and has failed to establish an expectation of remuneration from Defendant when it issued its policy. Accordingly, pursuant to Callano, there is no basis to conclude that an implied contract exists or that Defendant should be liable for unjust enrichment. Rather, as in Callano, the court finds that the proper remedy would be to sue Alli's estate. For those reasons, Count V is dismissed with prejudice.

6. Breach of Fiduciary Duty (Count III) and Negligence (Count IV)

In Count III, Plaintiff alleges that Defendant breached her fiduciary duty by mismanaging the Property. Pl.'s Comp. at ¶¶ 34-40. Defendant admitted to being a partner with Alli in several businesses, including Midgrove. Id at ¶¶ 12-14, 18-20, 22, 24, 28-31. According to Plaintiff, Defendant's management and operation resulted in the Property becoming burdened by an over-leverage of mortgages and tax liens in excess of the Property's value, while she personally profited to the detriment of Plaintiff. Id. at ¶¶ 34-40. As a result, Plaintiff alleges that Midgrove was operating in the zone of insolvency. Id.

In Count IV, Plaintiff alleges that as a result of Defendant's failure to exercise due and reasonable care and prudence in accordance with acceptable business standards by failing to stop,

correct, or disclose the wrongful conduct of her business partner, Defendant was negligent and careless in discharging her duties to Midgrove. Pl.'s Comp. at ¶¶ 54–55. Plaintiff has been and continues to suffer severe damages as a result of Defendant's negligence. Id. In addition, Plaintiff maintains that even though Midgrove was generating rental income, Defendant was diverting and misapplying the income, failing to ensure that all debts and obligations, including Plaintiff's mortgage, were satisfied in full. Id. at 11:55.

Pursuant to New Jersey law, once a corporation becomes insolvent, a director or officer assumes fiduciary or quasi-trust duty to the corporation's creditors. See Bd. of Trs. v. Foodtown, Inc., 296 F.3d 164, 173 (3d Cir. 2002); In re Stevens, 476 F. Supp. 147, 153 n.5 (D.N.J. 1979). In this instance, Plaintiff alleges that Defendant mismanaged the Property by failing to pay taxes and diverting rental income to herself rather than paying off debts related to the Property, and engaging in self-dealing. Pl.'s Comp. at ¶ 28.

At the outset, there are no facts alleged to show that Defendant owed a duty to either Bank of America or First American because First American is not a creditor of Midgrove. In that regard, Midgrove is not a party to the Bank of America Mortgage and Note.

Moreover, N.J.S.A. 2A:14-1 establishes a six-year statute of limitations for damages to real property. It is settled that the statute of limitations begins to run from the time of election of acceleration. Fed. Deposit Ins. Corp. v. Valencia Pork Store, 212 N.J. Super. 335, 338 (Super. Ct. 1986). Because Bank of America elected to accelerate payment of the balance on November 9, 2010, the six-year statute of limitations window expired on November 9, 2016. Plaintiff claims it did not find out about Defendant's connection to Midgrove until Fall 2012. Pl.'s Comp. ¶¶ 18, 22. Pursuant to N.J.S.A. 2A:14-1, "the limitations clock does not commence until a plaintiff is able to discover, through the exercise of reasonable diligence, the facts that form the basis for an

actionable claim against an identifiable defendant." Palisades at Fort Lee Condo. Ass'n v. 100 Old Palisade, LLC, 2017 N.J. LEXIS 845 *11 (citing Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001). In this case, however, Bank of America alleged in its November 10, 2010 foreclosure complaint that "[t]he mortgagors, obligors, their grantee or grantees, if any has defaulted in making their monthly mortgage payments to the Plaintiff and that said payments are have remained unpaid for more than 30 days of the date of mailing Notice of Default to the Obligor and are still unpaid." Bank of America also alleged that the "date of default is May 3, 2010." Again, First American, as the assignee of the Bank of America Mortgage and Note, is chargeable with knowledge of the default as it "simply moves into the shoes of the assignor," here Bank of America. Medtronic, supra, 247 F. 3d at 60. Accordingly, Fist American's causes of action for negligence and breach of fiduciary duty are dismissed with prejudice as both time barred and for failure to establish a debtor-creditor relationship as a matter of law.

7. Piercing the Veil of any and all Corporations of Limited Liability Companies (Count VIII)

Count VIII alleges a claim of piercing the corporate veil against Defendant, based on the assertion that Defendant disregarded the separate nature and legal existence of Midgrove in conducting her business, operations, and dealings with Plaintiff, by mismanaging and co-mingling Property assets. Pl.'s Comp. at ¶ 28.

New Jersey courts will disregard the corporation as the alter ego of its shareholders, officers, or owners, when the stockholders' disregard of the corporate entity makes it a mere instrumentality for the transaction of their own affair; there is such a unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and adherence to the doctrine of the corporate entity would promote injustice or protect fraud. Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34-36 (1950). A court must determine whether to pierce

an LLC's veil after examining multiple factors, including whether the entity was properly capitalized, whether the member abused the privilege of the LLC to commit a fraud, and whether funds were siphoned from the LLC. Operative Plasterers & Cement Masons Intern. Ass'n Local 8 v. AGJ Const., LLC, 2009 WL 2243900 (D.N.J. 2009), Beuff Enterprises Florida, Inc. v. Villa Pizza, LLC, 2008 WL 2565008 (D.N.J. 2008); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3d Cir. 1988).

Plaintiff has alleged facts that Defendant has diverted generated rental income to herself rather than using the money to pay off rightful debt relating to the Property. Pl.'s Comp. at ¶ 28. As stated earlier, however, there are no facts alleged to show that Defendant owed a duty to either Bank of America or First American because First American is not a creditor of Midgrove. In that regard, Midgrove is not a party to the Bank of America Mortgage and Note. For that reason, Plaintiff lacks standing to pursue a claim for veil piercing. Accordingly, Count VIII is dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's Complaint in its entirety is granted. All dismissals are with prejudice with the exception of Count I for common law fraud. See R. 4:6-2(e) (noting that ordinarily dismissals based on deficient pleadings are without prejudice).