

NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

JOHN and MELISSA PARENTE,

Plaintiffs,

v.

GARAS CONSTRUCTION, LLC;
COSTA ENGINEERING
CORPORATION; ROBERT COSTA;
BOROUGH OF RIVER EDGE; JIHAN
WANG; LING YAN; ABC CORP. 1-5
and JOHN DOES 1-5,

Defendants.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: BERGEN COUNTY

DOCKET No. C-313-18

OPINION

Argued: January 11, 2019

Decided: January 18, 2019

Appearances: Jason S. Nunnermacker, (Guaglardi & Meliti, LLP, attorneys) for plaintiffs

Peter W. Till, (Law Offices of Peter W. Till, attorneys) for defendants

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Motion to Dismiss, filed on December 26, 2018 by the Law Offices of Peter W. Till, counsel for Defendants, Costa Engineering Corporation and Robert Costa, Individually. On January 3, 2019 Plaintiffs John and Melissa Parente (hereinafter, “Plaintiffs”), by and through counsel Guaglardi & Meliti, LLP, filed opposition to the instant motion. The Court heard oral argument on the matter on January 11, 2019.

BACKGROUND

Plaintiffs currently reside at 266 Van Saun Drive, River Edge, New Jersey (hereinafter, the “Subject Property”). Defendant Garas Construction is the former owner of 272 Van Saun Drive,

which immediately adjoins Plaintiffs' property. Defendant Garas Construction was the owner of the property from approximately November 2017 until August 2018.

Plaintiffs' complaint alleges that the rear and side yards of the two properties were originally equal level grade, and subsequent to a certain construction process, the rear yard had been elevated to a height higher than Plaintiffs' rear yard. As a result, this alleged elevation has resulted in a significant amount of water run-off from the 272 Property onto the subject property. To date, the water run-off causes significant flooding events on Plaintiffs' property.

After the first documented flood event in December 2017, the Plaintiffs allegedly notified Defendant Garas Construction, Defendant Borough of River Edge, and the Borough's Engineer, Defendant Costa Engineering Corporation, as well as Defendant Robert Costa. Costa Engineering Corporation serves as the Borough of River Edge Engineer.

Costa Engineering Corporation allegedly explained to Plaintiffs that should Garas Construction seek a Certificate of Occupancy for any potential sale of the 272 Property, Garas Construction would be required to: (1) Equalize the grade of the 272 Property's rear and side yard to that of Plaintiff's property; (2) Install adequate drainage tanks and/or seepage pits on the 272 Property; (3) Prepare and effectuate topography to determine an adequate manner of water run off; and (4) Construct a dry-well on the Subject Property to capture any incidental water runoff.

Notwithstanding the abovementioned conditions, the Borough of River Edge allegedly issued a Certificate of Occupancy to Garas Construction and the 272 property was subsequently sold to Defendants Jihang Wang and Ling Yang. On November 20, 2018, Plaintiffs initiated the instant action.

LEGAL STANDARD

A defendant may move to dismiss a plaintiff's complaint for failure to state a cause of action under R. 4:6-2(e). Dismissal is warranted where no cause of action is identified or suggested by the facts of the complaint. Printing Mart, *supra*, 116 N.J. at 746.

When reviewing the complaint under such a motion, courts will accept well-pleaded facts as true and provide the non-moving party favorable factual inferences that are reasonable. Ibid. Moreover, a court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Ibid. Accordingly, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). However, if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

At this stage of the litigation, the Court should not be concerned with the plaintiff's ability to prove the allegations contained in the complaint, but rather should ascertain whether the facts alleged suggest a cause of action. Somers Const. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961).

While legitimate inferences are to be drawn in favor of the non-moving party, a court need not credit a complaint's bald assertions or legal conclusions. Printing Mart, *supra*, 116 N.J. at 768. A motion to dismiss for failure to state a claim may be addressed to specific counts of the complaint, and the court, on a motion to dismiss the entire complaint, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), *certif. den.* 153 N.J. 405 (1998) (dismissing contract and fraud claims, but sustaining intentional interference and promissory estoppel theories).

ANALYSIS

Qualified Immunity

Defendant argues that because Costa Engineering Corporation and Robert Costa are under the exclusive control and direction of the Borough of River Edge as the designated borough engineer, they are protected under the doctrine of qualified immunity.

The application of qualified immunity provided to public employees pursuant to N.J.S.A. 59:3-2(a) is explained as follows: A public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him. N.J.S.A. 59:2-3(a). Further, a public employee is not liable for any injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked. N.J.S.A. 59:3-6.

Plaintiff argues that at this early stage of the litigation, the Court should employ the test set forth in Saucier v. Katz, 533 U.S. 194, 200 (2001), which has two elements: (1) whether a constitutional right would have been violated on the facts alleged; and (2) assuming the violation is established, the question whether the right was clearly established. Saucier v. Katz, 533 U.S. 194, 200 (2001).

As an initial matter, the purposes for which Plaintiff encourages the Court to employ a patient and steady approach with the determination of Defendants qualified immunity status is actually contradictory to the purpose of the test outlined in Saucier. In fact, the Supreme Court notes in Saucier that “[w]here the Defendant seeks qualified immunity, a ruling on that issue should be made *early in the proceedings* so that the costs of an expenses of trial are avoided where the defense is

dispositive.” Id. at 200. In essence, the defense is “effectively lost if a case is erroneously permitted to go to trial.” Id. at 201.

Even under the Saucier test, and viewing the facts alleged in a light most favorable to the Plaintiff, the Court cannot find that any of Plaintiff’s constitutional rights have been violated. To the contrary, Defendants are not liable for any alleged injury to Plaintiffs because any such injury resulted from the exercise of judgment and discretion vested in them by the Borough of River Edge. Although Plaintiff asks this Court to allow a discovery period in order to determine whether or not the defense of qualified immunity applies, Plaintiff has not satisfied the first prong of the Saucier test because Plaintiff’s Complaint merely makes conclusory allegations that Plaintiff’s civil rights have been violated. Further, Plaintiff has not provided well-pleaded facts or support to demonstrate what constitutional rights it is even referring to that are “clearly established.” Although a R. 4:6-2(e) motion imposes a relaxed standard on what facts Plaintiff is to prove and with what degree of specificity, the standard imposed by the very case that Plaintiff recommends to this Court urges and stresses the importance of resolving immunity questions “at the earliest possible stage in litigation.” Id. at 201.

The more appropriate case authority argued by the parties is that of Filarsky v. Delia, 566 U.S. 377 (2012). In Filarsky, the Supreme Court of the United States decided a 42 U.S.C. § 1983 action against a city, its fire department, the fire chief, and ten other unidentified individuals in favor of the Defendants on summary judgment, holding that the Plaintiff had “not demonstrated a violation of a clearly established constitutional right. Filarsky, 566 U.S. at 382. There, the Supreme Court made several key findings that are directly applicable to the matter before this Court.

First, the Filarsky Court noted that the common law “[does] not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.” Id. at 387. Next, the Filarsky Court noted:

Such immunity “protects government’s ability to perform its traditional functions. (internal citations omitted). It does so by helping to avoid ‘unwarranted timidity’ in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits. (internal citations omitted).” Filarsky, 566 U.S. at 389-90.

Here, one of Plaintiff’s primary points of contention is that Defendants Robert Costa and Costa Engineering Corp are independent contractors, rather than employees of the borough, and thus may not be entitled to the qualified immunity they seek in this case. However, this logic is clearly inconsistent with the reasoning laid down by the Filarsky court, as the distinction to be drawn is not whether one acts strictly as an “employee,” but rather whether the actor is performing traditional government functions. Here, it is undisputed that Defendants Robert Costa and Costa Engineering Corp are the Borough Engineers, acting in their official capacity as state actors to perform a public service on behalf of the borough. Thus, the defense of qualified immunity would attach, even as to counts that fall under the Tort Claims Act.

Both Costa Engineering and Robert Costa were acting under the exclusive control and direction of the Borough of River Edge, subject to the Borough codes and regulations. Similarly, both Costa Engineering and Robert Costa were authorized by the Borough of River Edge to perform specifically designated tasks and services on behalf of the town. All papers, documents, memoranda, reports, designs, schemes or plans developed and created and other materials prepared by Costa

Engineering and Robert Costa in their work performed as the Borough Engineer are retained as the exclusive property of the Borough of River Edge.

The Filarsky decision and its parallels to the instant matter also highlight the important public policy implications of upholding the qualified immunity afforded to state actors such as borough engineers. As the Filarsky court puts it, the “public interest ensuring performance of government duties free from distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties.” Id. at 391. In essence, it would be imprudent for this Court to now take the position that every town engineer is susceptible and predisposed to personal liability any time it acts in its official governmental capacity. Such untethered accountability and threat of damages suits would undoubtedly trespass upon government’s need and ability to attract talented individuals to perform public services. While the Court’s decision should certainly not be misconstrued to imply that every private individual who performs work for or on behalf of the government shall be able to claim qualified immunity under any and all circumstances, the work performed by the town engineer in the instant matter is the sort of situation that this Court finds would fall under the umbrella of qualified immunity as interpreted by the Filarsky court.

Piercing the Corporate Veil

Defendant also argues that Defendant Robert Costa, individually, should be dismissed from the Complaint with prejudice based on the nonexistence of adequate grounds to pierce the corporate veil of Costa Engineering Corporation.

It is well established that a properly formed corporate entity is legally distinct from its shareholders or members and individual liability does not attach without piercing of the corporate veil or a legal determination disregarding the corporate form. State, Dept. of Environmental

Protection v. Ventron Corp., 94 N.J. 473, 500 (1983) (internal citations omitted). *In the absence of fraud or injustice*, courts generally will not pierce the corporate veil to impose liability on the corporate principals.” Lyon v. Barrett, 89 N.J. 294, 300 (1982) (emphasis added).

Here, Plaintiffs complaint raises several allegations against Defendant Costa. However, from the face of the complaint it is clear that all of the allegations stem directly from his actions as an agent of Costa Engineering Corporation. To survive a motion to dismiss, Plaintiff must proffer at least some well-pleaded facts and allegations of “fraud or injustice” that would enable the Court to make an inference in favor of piercing the corporate veil. Plaintiff, however, has not done so, for the reasons set forth below.

As an initial matter, Plaintiff’s brief filed in opposition to the instant motion does not even address Defendant Robert Costa, individually, in terms of piercing the corporate veil. Further, it is undisputed that Costa Engineering Corporation is a New Jersey Corporation organized under the laws of the State of New Jersey. Thus, the entity is unequivocally and legally distinct from Defendant Robert Costa personally. It is also clear at this time that all services rendered in connection with this matter were performed by Costa Engineering Corporation. Specifically, the associated charges for said services were billed from the corporate account for Costa Engineering Corporation, *not* by Robert Costa individually.

Count Eight of the Complaint alleges a violation of the New Jersey Civil Rights Act based on Defendant Costa’s alleged knowing allowance of Garas Construction and the current 272 property owners to create and maintain a significant damage upon Plaintiff’s property, thus depriving Plaintiffs of their property rights. Yet, no facts are plead that even suggest Robert Costa acted in such a wrongful and unlawful manner in an individual capacity distinct from his role at Costa Engineering Corporation. Further, no specific facts are plead that, taken as true, create an

inference that Robert Costa has violated the New Jersey Civil Rights Act. The Court is not inclined to credit Plaintiff's bald assertions or legal conclusions. As it stands now, Plaintiff offers no support whatsoever, either in its Complaint or its response papers to the instant motion, that even hint it is entitled to relief under the N.J.S.A. 10:6-2(c) from Defendant Robert Costa in an individual capacity.

In comparison, Counts nine and ten of the Complaint name Robert Costa individually, but similarly refer to actions performed exclusively as an agent for the Costa Corporation. Count Nine alleges intentional and reckless performance of its construction activities rising to the level of breach of the duty of care owed to Plaintiffs. However, Plaintiff does not plead any facts, nor provide any arguments, that suggest that Robert Costa, *in an individual capacity*, even owed a duty to Plaintiffs, let alone violated said. Similarly, count ten alleges negligent misrepresentation against Defendant Costa for allegedly providing false information and incorrect statements to Plaintiffs regarding the steps Garas would be required to take prior to sale. Nevertheless, Plaintiff pleads no facts that would allow the Court to make a favorable inference that Robert Costa, *in an individual capacity*, acted in a fraudulent and unjust manner that would warrant the Court to fashion a remedy piercing the corporate veil.

Thus, it is clear to the Court that at this time that the based on the dearth of facts alleged by Plaintiff in the Complaint pertaining to Robert Costa individually, Plaintiff's Complaint simply does not suggest a viable cause of action against Defendant Costa in his individual capacity. Even accepting the abovementioned pleadings as true, and viewing them in a light most favorable to the Plaintiff, the Court finds Defendant Robert Costa has acted exclusively as an agent of Costa Engineering Corporation, and that any purported wrongdoing alleged in the complaint is not the fraudulent and unjust behavior that allows the Court to pierce the corporate veil.

CONCLUSION

Plaintiff's Complaint fails to allege sufficient facts, even under the relaxed standard imposed by R.4:6-2(e), to suggest a cause of action against Defendant Robert Costa individually that would require a piercing of the corporate veil. Further, Defendants Robert Costa and Costa Engineering Corporation have clearly established their role as the Borough of River Edge's town engineer, and thus their entitlement to the defense of qualified immunity in this action. Therefore, Defendants Motion to Dismiss the Complaint as to Defendants Robert Costa individually and Costa Engineering Corporation is hereby granted, and those individuals are dismissed without prejudice. An Order accompanies this Decision.