

NOT TO BE PUBLISHED WITHOUT THE APPROVAL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

1707 REALTY, LLC,

Plaintiff,

v.

REVOLUTION ARCHITECTURE, LLC,
CONRAD RONCATI, R.A.,
ARCHITECTURA, INC., JOHNSON SOILS
COMPANY, LISA V. MAHLE-GRECO,
BERTIN ENGINEERING ASSOCIATES,
INC. and, CALISTO BERTIN P.E.,

Defendants,

and

JOHNSON SOILS COMPANY; LISA V.
MAHLE-GRECO, and, CALISTO BERTIN
P.E.,

Third-Party Plaintiffs,

v.

STALWART CONSTRUCTION, LLC;
ULTRA GENERAL CONTRACTING
CORP.; GREGORY FASSANO; ET ALS.

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

DOCKET NO. **BER-L-2202-17**

Civil Action

OPINION

Argued: November 13, 2020
Decided: November 20, 2020

HONORABLE ROBERT C. WILSON, J.S.C.

Leonard E. Seaman, Esq. appearing on behalf of Plaintiff 1707 Realty, LLC (from The Law Offices of Richard Malagiere, P.C.)

Kelly A. Waters, Esq. and Jill A. Mucerino, Esq., appearing on behalf of Defendants/Third-Party Plaintiffs Johnson Soils Company, Lisa V. Mahle-Greco P.E., and Calisto Bertin P.E. (from Wood Smith Henning & Berman, LLP)

Robin S. Rubin, Esq. appearing on behalf of Defendants Revolution Architecture, LLC, Conrad Roncati, R.A., and Architectura, Inc. (from Milber Makris Plousadis & Seiden, LLP)

Michael J. Jubanyik, Esq. and Christine J. Viggiano, Esq., appearing on behalf of Defendants Bertin Engineering Associates and Calisto Bertin, P.E. (from Reilly, McDevitt & Henrich, P.C.)

PROCEDURAL HISTORY

THIS MATER initially began on November 13, 2015, when Engineered Devices Corporation initiated a legal action against 1707 Realty LLC (“Plaintiff”), and Stalwart Construction, LLC (“Stalwart”) by filing a complaint in the Superior Court of New Jersey, Hudson County, Docket No. HUD-L-4673-15, to recover on a construction lien claim (“Engineered Devices Litigation”). On February 11, 2016, Plaintiff filed crossclaims against Stalwart and Vincent DiGregorio—the owner and president of Stalwart—in the Engineered Devices Litigation.

Count One of Plaintiff’s crossclaim was against DiGregorio, in his capacity as a representative of Stalwart, for fraud relating to payment applications submitted at the Project. Count Three of Plaintiff’s crossclaim was against Stalwart for breach of contract for failure and refusal to provide Plaintiff with sufficiently skilled workers or proper materials.

Plaintiff was represented by The Law Offices of Richard Malagiere in the Engineered Devices Litigation, and in accordance with Court Rules, Mr. Malagiere, Esq. filed a certification together with Plaintiff’s responsive pleading and crossclaim stating: “I further certify that the matter in controversy is not the subject matter of any other action pending in any Court or of a pending arbitration proceeding...” and “I further certify that to the best of my knowledge, information and belief, no other party should be joined in this action.” The Engineered Devices Litigation was consolidated with three other like actions by way of an April 1, 2016, Order of the Court in response to the Notice of Motion to Consolidate filed on behalf of Plaintiff. As to Stalwart, Plaintiff claimed defective work product and numerous construction defects.

On May 19, 2016, through its attorney Leonard E. Seaman, Esq., of The Law Offices of Richard Malagiere, Plaintiff filed a Notice of Motion for leave to serve a Third-Party Defendant proceeding against Ultra Contracting and Gregory Fasano (“Global Group”). In Mr. Seaman’s

Certification he stated that “1707 seeks to recover from Global and Ultra for damage to the property.” Counsel further certified that Plaintiff’s claims against Global Group and Ultra should be “included as part of the matters in controversy to all a full and complete resolution of all claims in one forum.”

Having been granted leave of Court, Plaintiff filed a Third-Party Complaint against Ultra and Global Group in the Engineered Devices Litigation on June 14, 2016, alleging that Ultra and Global entered into a subcontract with Stalwart to provide labor and materials within the concrete scope of work in the construction of the Project. Plaintiff alleged that Global and Ultra “failed to construct the Project in accordance with industry standards including but not limited to local building codes. In particular numerous failures in work of Global required and continue to require extensive remediation by 1707 to portions of the Project including, but not limited to portions of the Project other than the work or products of Global.” Plaintiff also alleged “the negligence, carelessness, or recklessness” of Global and Ultra “was a proximate cause of damages suffered by 1707.” Mr. Malagiere’s Certification filed on June 14, 2016, attached to the Third-Party Complaint again stated “I certify Pursuant to R. 4:5-1 that the matter in controversy is not the subject matter of any other action pending in any other Court or of a pending arbitration proceeding...” and “I further certify that to the best of my knowledge, information and belief, no other party should be joined in this action.”

On January 25, 2017, an Order of Final Judgment was entered against Vincent DiGregorio as to Plaintiff’s crossclaim for fraud in the amount of \$681,506.00 (“DiGregorio Judgment”). Calculation of the DiGregorio Judgment included consideration of overpayment made to Stalwart, and included damages incurred by Plaintiff with respect to remedial work at the Project.

Only then on March 24, 2017 did Plaintiff file a Complaint in Bergen County, under Docket No. BER-L-2202-17, initiating this action. Plaintiff amended its pleadings with the filing of a First, Second, and finally, a Third Amended Complaint on October 10, 2019. The Complaint asserts claims of negligence arising out of the construction of the Project. On August 22, 2017 Defendants Johnson Soils Company (“JSC”) and Lisa Mahle-Greco were served with the Summons and Complaint. On August 29, 2017, Defendant Calisto Bertin, P.E., was served with the Summons and Complaint. Plaintiff alleges that JSC entered into an agreement to provide construction testing and monitoring of certain aspects of the same construction project, including but not limited to testing and monitoring of cast-in-place concrete, masonry, and structural steel installations. Plaintiff alleges that JSC, Lisa Mahle-Greco, and Calisto Bertin (“Moving Defendants”) are liable for the defects in the construction of the Project because they “failed to observe and/or failed to require the general contractor to correct various deficiencies in the Project.” The Complaint and subsequent iterations generally allege defects in the construction of the footings, stairs, columns, foundation, and use of unacceptable fill.

FACTUAL BACKGROUND

THE INSTANT MATTER again arises out of this one construction project, and an agreement entered between Plaintiff, and the general contractor, Stalwart, for performance of site work at the Project (“Stalwart Site Contract”). In May of 2014, Stalwart commenced site work at the Project. In September of 2014, Plaintiff entered into a second agreement with Stalwart for the construction of the hotel building at the Project, referred to as the “tower” (“Stalwart Tower Contract”). On or about September 2, 2014 JSC began performing inspections at the Project. On December 17, 2014, Stalwart commenced work on the Tower.

In April of 2015, Plaintiff retained Bryan Sullivan of PTC Consulting to serve as the owner's representative for the Project. As Plaintiff's representative, Mr. Sullivan was responsible for the day-to-day handling of the Project. As part of his role and responsibility, Sullivan oversaw the progress of the Project and the status of its completion. In May of 2015, Mr. Sullivan assessed the quality of the work and alerted Plaintiff to alleged defects in the construction of the Project. The defects identified by Sullivan were both site work and tower work. In May of 2015, Plaintiff became aware of alleged deficiencies with respect to JSC's inspections. As per Plaintiff, Bryan Sullivan was the primary person responsible for noting and documenting the defective conditions.

As early as May 22, 2015, Plaintiff was aware that Sullivan determined that Stalwart was not acting in compliance with its contract. In a "Notice of Non-Compliance with Contract" Mr. Sullivan notified Stalwart that it had failed to provide "standard protocol for Code required controlled inspections, scheduling, and on-site or office inspection," which was central to JSC's involvement with the Project. Plaintiff was unable to identify the remediation performed by Stalwart after the May 22, 2015 Notice of Non-Compliance with Contract, and in fact Plaintiff's principal conceded that he "wish[ed] we had Bryan [Sullivan] here." Without Mr. Sullivan, Plaintiff cannot describe or identify the work that was repaired by Stalwart before it left the Project.

On September 28, 2015, Plaintiff issued a Notice of Default to Stalwart, with regard to the Stalwart Tower Contract, stating that Stalwart failed "to construct the project in accordance with industry standards including but not limited to local building codes, in particular numerous failures in the placement of rebar and the pouring of concrete which required and continues to require extensive remediation." On October 7, 2015, Stalwarts contracts were terminated for cause. At the time Stalwart was terminated, the Project was partially completed up to the second

floor. After Stalwart's termination and in October of 2015, March Associates Construction, Inc. ("March") replaced Stalwart at the Project. Mr. Sullivan prepared March's scopes of work for both remedial work and for remaining and incomplete work. According to Plaintiff, no remedial work was done without Bryan Sullivan being present or being aware of it. On August 15, 2017, the Project had been completely remediated and completed, and a certificate of occupancy was issued. Plaintiff credits Sullivan with having "saved the Project."

Plaintiff failed to put Defendants on notice of its claims against them before March remediated and completed the Project. Bryan Sullivan then died on March 5, 2018. Defendant served Plaintiff with discovery demands on November 1, 2017, months prior to Mr. Sullivan's passing. Plaintiff, however, did not produce any documents in this case until April 30, 2018. Only then did Plaintiff first identify PTC Consultants, which was Mr. Sullivan's business, as the owner's representative. Plaintiff's April 30, 2018, correspondence, provided records of "PTC Consultants, LLC who served as owner's representative on the project," but made no mention of Mr. Sullivan, nor indicated that he was deceased. As of April 30, 2018, Plaintiff had yet to produce its answers to interrogatories, and stated that its answers to interrogatories were in the process of review by its representative for certification and would be provided in the "upcoming days." In fact, Plaintiff did not produce its answers to interrogatories until May 17, 2018, at which time Sullivan was identified for the first time as a person with knowledge of facts relevant to this case. Plaintiff did nothing to preserve the testimony of Bryan Sullivan.

Plaintiff's crossclaims in the Engineered Devices Litigation were filed in February of 2016, in Hudson County, and Plaintiff's present Complaint was filed in March of 2017 in Bergen County. The factual basis of the Engineered Devices Litigation and the current litigation are both alleged to have been cause by construction defects in connection with construction of the Project. In the Engineered Devices Litigation, Plaintiff asserted identical claims arising out of

the same alleged defects claimed in the present lawsuit, and the cause of action was litigated and resulted in a judgment in favor of Plaintiff—with damages in the prior litigation overlapping those sought in the present suit. It is undisputed that Plaintiff was aware of Defendants’ potential liability during the course of the Engineered Devices Litigation. Thereafter, the individual most knowledgeable about the facts of the alleged defects and resultant damages, Bryan Sullivan, died on March 5, 2018, before he was disclosed by Plaintiff in this litigation and thus his testimony was not preserved.

For the reasons set forth below, Defendants’ Motion to Dismiss is hereby **GRANTED**.

MOTION TO DISMISS STANDARD UNDER RULE 4:6-2(e)

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations “to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . .” Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id. It is simply not enough for a party to file mere conclusory allegations as the basis of its complaint. See Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012); see also Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Env’tl. Prot., 320 N.J. Super 59, 64 (App. Div. 1999), aff’d o.b. 170 N.J. 246 (2001) (“Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.”).

Under the New Jersey Court Rules, a complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e),

at 1348 (2010) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The “test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts.” Printing Mart, 116 N.J. at 746. However, “a court must dismiss the plaintiff’s complaint if it has failed to articulate a legal basis entitling plaintiff to relief.” Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULES OF LAW AND DECISION

The Entire Controversy Doctrine and New Jersey Court Rule 4:5-1(b)(2) require that this matter be dismissed with prejudice. Plaintiff initiated this matter by filing a Complaint against the Defendants on March 27, 2017, seeking to recover damages arising from the alleged defective construction of Plaintiff’s hotel which, unbeknownst to the Defendants, the Plaintiff had already litigated in Hudson County—the Engineered Devices Litigation. Docket No. HUD-L-4673-15. The Engineered Devices Litigation resulted in a judgment for the Plaintiff, and the Plaintiff’s damages covered by that litigation directly overlap with those sought in the present suit, presenting the potential for Plaintiff’s double recovery. For those reasons, and the reason stated below, the Plaintiff’s Third Amended Complaint must be dismissed as a matter of law.

I. The Entire Controversy Doctrine Applies and Warrants Dismissal of the Third Amended Complaint

The Entire Controversy Doctrine has been a cornerstone of New Jersey’s jurisprudence for many years, as evidenced by the Supreme Court’s longstanding “preference that related matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation.” Kent Motor Cars Inc. v. Reynolds, 207 N.J. 428, 443

(2011); see also Falcone v. Middlesex County Med. Soc’y, 47 N.J. 92 (1966) (citations omitted). The Entire Controversy Doctrine, which finds its support in our Constitution, requires a litigant to present “all aspects of a controversy in one legal proceeding.” Kent, 207 N.J. at 443; Hobart Bros. Co. v. Nat’l Union Fire Ins. Co., 345 N.J. Super. 229, 240-41 (App. Div. 2002) (citations omitted); N.J. Const. art. VI, § III, ¶ 4.

Our Courts have recognized the purposes of the Doctrine include “the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of ‘piecemeal decisions.’” Kent, 207 N.J. at 443 (citing Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989) (citations omitted)). In determining the applicability of the Entire Controversy Doctrine in complex construction litigation, this Court looks to the core set of facts that provide the link between the distinct claims against the parties in each set of litigation. See Hobart Bros. Co., 354 N.J. Super. at 244. “The essential consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts.” Id. (quotations omitted).

The Entire Controversy Doctrine applies here as the controversy which forms the factual nexus of the instant action also was at the heart of the Engineered Devices Litigation. In that case, Plaintiff brought claims of fraud against Vincent DiGregorio (counts one and two) and breach of contract against Stalwart (count three) in the form of crossclaims. Plaintiff also filed a Third-Party Complaint in the Engineered Devices Litigation asserting claims for defective workmanship against two of Stalwart’s subcontractors. That case was litigated and resulted in an Order of Final Judgment entered against Stalwart principal, Vincent DiGregorio, in favor of Plaintiff (the “DiGregorio Judgment”).

a. The Basis of Plaintiff's Claims in both this Matter and the Engineered Devices Litigation was Stalwart's Performance and Representations as to Quality and Completion of this Construction Project

The Engineered Devices Litigation was initiated as four separate lien actions which were ultimately consolidated. By virtue of Plaintiff's crossclaims against Stalwart and Stalwart's principal, Vincent DiGregorio, the scope of the suit expanded beyond the lien actions to include claims arising out of Stalwart's defective workmanship and representations made regarding the quality and status of its workmanship. These facts formed the basis for Plaintiff's crossclaims and subsequent third-party claims in the Engineered Devices Litigation, pursuant to which Plaintiff sought the recovery of damages for defective workmanship and for overpayment on this Project.

First, Plaintiff's crossclaim against Stalwart for breach of contract was due to defective workmanship. Plaintiff claimed that Stalwart had not constructed the Project in accordance with industry standards, including violating local building codes, and referenced multiple failures including the placement of rebar and the pouring of concrete, which required extensive remediation. In the instant case, the Plaintiff seeks recovery for damages caused by Stalwart's defective construction at the Project. The Complaint identifies defects in the construction of the concrete footings, stairs, columns, foundations, and use of unacceptable fill. More specifically, Plaintiff's expert Thornton Tomasetti alleges defects in the rebar and concrete placement with respect to rebar dowels, incorrectly located rebar, and mis-located columns.

Second, the failure to provide skilled workers and the allegation of "numerous construction defects," resulted in the Plaintiff's Third-Party Complaint against Ultra and Global in the Engineered Devices Litigation. That Complaint alleged that Global and Ultra had entered into contracts with Stalwart to provide labor and materials within the concrete scope of work in

the construction project. It is undisputed that Plaintiff's claims against Ultra and Global centered on the alleged defective workmanship with regard to the concrete work at the Project. In the instant case, the defects and remedial costs alleged are the result of Stalwart's breach of contract. The Plaintiff alleges the Defendants are liable because they failed to observe and/or failed to require Stalwart to correct various deficiencies in the Project, meanwhile Plaintiff's liability expert concluded that the damages incurred were attributable to Stalwart.

And third, Plaintiff's claim against Mr. DiGregorio was for fraudulent payment requisitions—specifically, fraud relating to misrepresentations regarding the status and quality of work performed as set forth in payment applications. In the instant case, the Plaintiff seeks the recovery of overpayment made to Stalwart, in part, for the improper approval of payment application requisitions. The facts giving rise to this claim and the others asserted by Plaintiff in the Engineered Devices Litigation are the same as those proffered in support of the claims made against the Defendants in the instant matter.

As the record establishes, the facts and controversy that form the basis of this action and the Engineered Devices Litigation are not just interrelated but are identical. Plaintiff and Plaintiff's Counsel have also conceded that the matters in controversy are the same.

b. The Third Amended Complaint Should be Dismissed for Plaintiff's

Failure to Comply With its Obligations Under Rule 4:5-1(b)(2)

Plaintiff asserts that under the Entire Controversy Doctrine and R. 4:5-1(b)(2) “a successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.” Defendants were clearly prejudiced and deprived of vital discovery, which Plaintiff had

an affirmative obligation to identify to the Defendants including as to potentially liable parties in the Engineered Devices Litigation, but inexcusably failed to do so.

The Rule referenced above was intended to implement the Entire Controversy Doctrine and its underlying philosophy. See Mortgageling Corp. v. Commonwealth Land Title Ins., 262 N.J. Super. 178, 185 (Law Div.), aff'd 279 N.J. Super. 89, aff'd in part rev'd in part, 142 N.J. 336 (1995). All parties to a litigation have an obligation to reveal the existence of any non-party who should be joined, or who might have an obligation to reveal the existence of any non-party who should be joined, or who might have some potential liability to any current party on the basis of the same transactional facts. See Kent, 207 N.J. at 444-45. Such obligation is continuing and requires parties to make such disclosures during the course of the litigation if a party with potential liability is identified. R. 4:5-1(b)(2).

Through the course of the Engineered Devices Litigation, Plaintiff was aware that the other Defendants were potentially liable for the damages it alleged—as early as May 2015 according to the deposition of Moshe Winer at 744:9-19. Not only were these Defendants not mentioned, but Plaintiff affirmatively represented in the Hudson County Pleadings that there were no other potentially liable parties or parties that should be joined to the Engineered Devices Litigation. The Third-Party Complaint in the Engineered Devices Litigation was filed on June 14, 2016—more than a year after Plaintiff had learned of the claimed deficiencies with respect to Defendants' inspections. Plaintiff had an affirmative obligation to identify the Defendants as potentially liable parties, but nonetheless never named them in the original litigation despite ample opportunity to do so. Even after the Default was entered in the prior litigation in January of 2017, Plaintiff had not sought to add Defendants to that proceeding. It wasn't until March of 2017 that Plaintiff initiated this separate and distinct action based on the same facts and asking for overlapping damages. It is for that reason that this Court finds Plaintiff's actions failed to

comply with the Entire Controversy Doctrine and Rule 4:5-1(B)(2) by causing substantial prejudice to the Moving Defendants.

c. The Third Amended Complaint should be Dismissed for Plaintiff's

**Failure to Comply With its Obligations Under Rule 4:5-1(b)(2) Resulting
in Substantial Prejudice**

It is in the trial court's discretion to dismiss a successive action on a showing that the party's failure to comply with its certification obligation constitutes inexcusable conduct and resulted in substantial prejudice to the undisclosed party who was not joined in the action. Mitchell v. Procini, 315 N.J. Super. 557, 564-65 (App. Div. 1998). In making that decision, the Court looks to whether a party's ability to mount a defense on that claim is "unfairly hampered." Hobart Bros. Co., 354 N.J. Super. at 243. The Appellate Division has equated "substantial prejudice" with "the loss of witnesses, the loss of evidence, fading memories and the like." Kent, 207 N.J. at 446 (citing Mitchell, 331 N.J. Super. at 454) (quotations omitted). A party's access to relevant information "is largely dispositive of the 'substantial prejudice' issue..." Kent, 207 N.J. at 446 (quoting Lamb v. Global landfill Reclaiming, 111 N.J. 134, 152 (1988)).

In the present case, Defendants are substantially prejudiced because they were deprived of an opportunity to have an expert examine and investigate the claimed defects, and they were deprived of the opportunity to examine a key witness, Bryan Sullivan. At the time Plaintiff filed its answer and crossclaims the construction was ongoing at the Project and remediation had not yet been completed. It wasn't until about March 9, 2016 that remedial work began. (See Bryan Sullivan "Change Log Order"). Defendants were unaware of the Plaintiff's allegations of negligent inspections until after the entire project had been remediated. The Complaint in this action was filed on March 24, 2017 while the Project was ongoing, but the Defendants were not served until months later, after a Certificate of Occupancy was issued on August 15, 2017. Had

the Defendants been named or otherwise put on notice of a potential claim against them in the Engineered Devices Litigation, they would have had the opportunity to preserve and collect evidence relevant to the alleged defects, related Project delay, as well as remediation efforts.

Defendants were also deprived of the opportunity to preserve and collect evidence supplied by a key witness, Bryan Sullivan. Mr. Sullivan was actually identified by Plaintiff as the person most knowledgeable about the claims. While Mr. Sullivan would have been available as a witness at the time of the Engineered Devices Litigation, he was not available during the course of this litigation due to Plaintiff's failure to identify him as a person with knowledge until May 17, 2018, following the March 5, 2018 date of his passing.

Moreover, Plaintiff did not act to preserve the testimony of Mr. Sullivan—as the owner's representative responsible for the day-to-day handling of the Project in question. As stated earlier, Mr. Bryan Sullivan was instrumental in evaluating and compiling information regarding the performance of general contractor Stalwart at the Project as it related to its non-conformance with the contract documents. When Stalwart was originally replaced with March, it was Mr. Sullivan who identified the necessary remedial work and further prepared the scope of work to be included in March's contracts on behalf of Plaintiff. Mr. Sullivan's absence results in substantial prejudice because Sullivan's scope of knowledge was unrivaled—he had firsthand knowledge of the claimed defects, personally discovering and examining the conditions, and coordinated the remedial work, including the scope of Stalwart's non-compliance, the scope of the replacement contractors remedial work, and supervision of the remediation of the defects.

Furthermore, Mr. Sullivan's observations and analyses are extensively relied on by the Plaintiff and its expert in formulating their allegations as to the existence of defects, scope of remediation, and calculation of damages. And while Bryan Sullivan was the primary person responsible for noting and documenting the defective conditions, he did not put together a formal

report of his investigation of the defects, but rather only noted his observation in recorded Project Notes. Plaintiff's non-compliance with Rule 4:5-1(b)(2) in neglecting to name the Defendants in the prior action has resulted in the Defendants' inability to procure testimony from Mr. Sullivan as to his observations, recollection, and opinions, and further authentication of his file documents. His unavailability in this matter directly impacts Defendants' ability to respond to Plaintiff's allegations, thus substantially prejudicing their ability to defend the claims.

Lastly, Plaintiff responds to the claim of substantial prejudice by explaining that all parties were harmed by Mr. Sullivan's passing, and that remediation or mitigation should not be conflated with the destruction of evidence. While the Court agrees with these points in principle, the issue in the present matter is that the prejudice to the Defendant was directly caused by the Plaintiff's delay and non-compliance with Rule 4:5-1(b)(2). The point of the Entire Controversy Doctrine is to avoid situations such as these, and the Court finds that, had the rule been followed, this prejudice would not have occurred.

**d. The Third Amended Complaint should be Dismissed to Prevent
Plaintiff's Double Recovery**

New Jersey Courts have long recognized the inequity and substantial prejudice that results from double recovery. The Entire Controversy Doctrine was in fact partially intended to prevent a party from "two attempts at recovery." Hobart Bros. Co., 345 N.J. Super. at 243; Thomas v. Hargest, 363 N.J. Super 589, 595 (App. Div. 2003). A party's inability to allocate damages is also relevant for substantial prejudice, in the context of the Entire Controversy Doctrine. Mitchell v. Procini, 315 N.J. Super. 557, 564-65 (App. Div. 1998); see also Hobart Bros. Co., 345 N.J. Super. at 243. Here, Plaintiff seeks damages that overlap with the damages sought in the Engineered Devices Litigation and are included in the DiGregorio Judgment.

Defendants maintain that Plaintiff's failure to join them deprived the Defendants of any opportunity to receive an allocation, credit, or offset for the DiGregorio Judgment because the damages are duplicative of those claimed in the prior case. The Court notes that this claim is of particular importance in complex construction cases. A contractor or property owner is thus precluded from proceeding against other contractors or subcontractors individually in different courts at different times. In fact, the very purpose of the Entire Controversy Doctrine—as well as the State's Complex Business Litigation Program—is to create a system for these complex construction disputes to be handled in an organized manner, without such “piecemeal” litigation tactics. When Plaintiff initiated its crossclaims and its Third-Party Complaint in the Engineered Devices Litigation and certified that there were no other parties it intended to join—while it knew the potential for the alleged liability on behalf of the Moving Defendants—it clearly violated Rule 4:5-1(b)(2).

e. Plaintiff's Claims That the Entire Controversy Doctrine Should Not Apply Because the Prior Proceeding Did Not Involve Sufficient Judicial Resources, or Was Brought Too Late Are Both Without Merit

The Plaintiff contends that the Entire Controversy Doctrine should not be invoked here because it did not have an adequate opportunity to present its claims in the earlier litigation and that it did not involve sufficient judicial resources. In that prior action Plaintiff's “lien foreclosure action,” eventually evolved and Plaintiff had the opportunity to present and pursue claims arising out of defective workmanship at the Project and the certification of payment applications. Plaintiff further argued that, once it reached a settlement of the “primary claims” the “process of joining additional parties ended,” relying upon Karpovich v. Barbarula, 150 N.J. 473 (1997). First, Karpovich is wholly unlike the present case because Karpovich involved a case where there actually was minimal judicial involvement and no exchange of discovery.

Furthermore, the Plaintiff's settlement in the Engineered Devices Litigation was only a partial settlement and was followed by Plaintiff's Third-Party Complaint the very next day. Although settlement terms were reached in July of 2016, the final disposition was not until July 25, 2017. Lastly, Karpovich concerned the joinder of a legal malpractice claim with a claim of embezzlement. 150 N.J. 473 (1997). This case was concerning the same subject matter—construction Project defects and failure to inspect—against multiple Defendants.

Finally, Plaintiff's claim that the Entire Controversy Doctrine claim was filed late is without merit. First, Moving Defendant asserted the Entire Controversy Doctrine claim in their Fifth Affirmative Defense in the Answer to the Complaint filed on October 17, 2020. Second, certain information was not immediately available for Defendant's claim. After Mr. Sullivan's death, for example, Defendant's substantial prejudice claims were not "ripe" for adjudication prior to Plaintiff's expert reports. The production of such reports was necessary to fully understand the depth and scope of Plaintiff's reliance on Sullivan's work.

HOLDING

Plaintiff's Complaint is dismissed on the basis of the Entire Controversy Doctrine and Rule 4:5-1(b)(2). Plaintiff's crossclaims and third-party complaints in the Engineered Devices Litigation in Hudson County rely on an identical factual basis as the current litigation and seek to recover overlapping damages from the same. Plaintiff's piecemeal litigation technique is untenable in light of Rule 4:5-1(b)(2) and the Entire Controversy Doctrine. To protect the Defendant from substantial prejudice and Plaintiff's inexcusable delay in filing the present Complaint, that Complaint must be dismissed.

CONCLUSION

For the aforementioned reasons, Defendants' Motion to Dismiss is **GRANTED**.