ROBERT J. KINLEY,	: IN THE COURT OF COMMON PLEAS OF
	: LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:
	:
vs.	: NO. 03-01,089
	:
	:
	:
SLP INDUSTRIES, INC., and	:
DENNIS P. CALKINS, Individually	:
	:
Defendants	: PRELIMINARY OBJECTIONS

Date: January 12, 2005

OPINION and ORDER

Before the Court for determination are the Preliminary Objections of Defendants SLP Industries, Inc. (hereafter "SLP Industries") and Dennis P. Calkins (hereafter "Calkins") filed July 9, 2004 to Plaintiff Robert J. Kinley's (hereafter "Kinley") Amended Complaint filed June 16, 2004. The Court will deny in part and grant in part the preliminary objections.

In the Amended Complaint, Kinley asserts four causes of action against the Defendants. The two causes of action asserted against SLP Industries are breach of contract (Count I) and fraud (Count II). The two causes of action asserted against Calkins are breach of contract (Count III) and fraud (Count IV). In support of these claims, Kinley avers the following facts, much of which where incorporated from the original Complaint.[1]

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[1] "Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading in the same action …." Pa.R.C.P. 1019(g).

On April 8, 2000, Kinley and SLP Industries entered into a written contract. The signatories to the contract were Kinley and Calkins. Calkins signed the agreement as president of SLP Industries. Under the terms of the contract, SLP Industries agreed to purchase from Kinley twenty-four lots located at Beauty Run, Lycoming County, Pennsylvania. SLP Industries agreed that for every home that was constructed on one if its lots, it would also construct a home on one of Kinley's lots. Kinley also agreed to contract with SLP Industries to perform the actual construction on twelve lots. As far as specifications for the homes, the contract had attached to it drawings of the proposed homes that were to be modified to the panelog building system.[2] Kinley was to have final approval over the plans. The contract further provided that construction of a home was not to exceed one year. Kinley agreed to pay SLP Industries $60,000 per home. Payment for the construction would be as follows: 60% ($36,000) once the foundation was completed and the package delivered to the site; the balance was due when the package was dried-in and shingled.

In accordance with this contract and other oral agreements between Kinley and Calkins, construction began on six of Kinley's Beauty Run Estates lots. None of the six homes were completed. The stages of completion varied form a partially dug foundation to the home having a roof. The construction that was actually undertaken was not done in a workmanlike manner and was defective in that: there were cracked and insufficient foundations; less square footage then restrictions required; lack of insulation; a leaking roof; and various code violations.

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[2] The Court would note that no such drawings accompanied the copy of the contract attached to the original Complaint.

From June 28, 2000 to February 20, 2002, Kinley advanced SLP Industries money to fund the construction of the six homes. The total amount advanced was $600,000. Kinley expended $110,000 to repair one of the homes constructed by SLP Industries. With regard to the other five lots, the construction undertaken will need to be razed so that the lots may once again be viable residential construction.

The Amended Complaint also alleges that Calkins is the sole shareholder, director, and officer of SLP Industries. The Amended Complaint avers that Calkins was solely responsible for all financing and construction activities of SLP Industries. He made all decisions, including disbursement, concerning the funds advanced by Kinley for the construction of the residential units on the Beauty Run lots. The Amended Complaint alleges that it was Calkins who personally made all material representations concerning the construction of the residential units.

SLP Industries and Calkins have asserted three preliminary objections to the Amended Complaint. The first is that the breach of contract claims are not sufficiently specific. SLP Industries and Calkins argue that the Amended Complaint fails to specify whether the alleged agreement was written or oral and fails to allege facts to establish the breach of contract claims. The second preliminary objection is to the fraud claims. SLP Industries and Calkins argue that the Amended Complaint again lacks the requisite specificity in that it fails to allege the necessary elements to make out a cause of action for fraud. The third preliminary objection is another attach on the Amended Complaint's specificity. Here, SLP Industries and Calkins assert that the Amended Complaint fails to allege the necessary facts that would permit Kinley

to bring the breach of contract and fraud claims asserted in Counts III and IV against Calkins in his individual capacity.

The Court will analyze the preliminary objections to the breach of contract and fraud claims as if the claims could be asserted individually against Calkins. The focus of these preliminary objections is whether or not the Amended Complaint has alleged facts to support the claims. The Court will address separately the issue of whether the alleged facts permit Calkins to be sued in his individual capacity.

Pennsylvania is a fact pleading state. ***Miketic v. Baron***, 675 A.2d, 324, 330 (Pa. Super. 1986). A complaint must set forth the material facts upon which the cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). The complaint must apprise the defendant of the claim being asserted and summarize the material facts needed to support the claim. ***Cardenas v. Schober***, 783 A.2d 317, 325 (Pa. Super. 2001), *app. denied*, *app. granted*, 797 A.2d 907 (Pa. 2002); ***Alpha Tau Omega Fraternity v. Univ. of Pennsylvania***, 464 A.2d 1349, 1351 (Pa. Super. 1993).

A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "… is confined to the content of the complaint." ***In re Adoption of S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." ***Ibid***. The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from

those facts. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997). "'If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.'" ***Ibid***. (quoting ***The County of Allegheny v. The Commonwealth of Pennsylvania***, 490 A.2d 402, 408 (Pa. 1985)).

The Court will address the preliminary objections to the breach of contract claims first. In order to maintain a cause of action for breach of contract, a plaintiff must plead: (1) the existence of a contract including its essential terms; (2) a breach of duty imposed by the contract; and (3) resultant damages. ***Presbyterian Med. Ctr. v. Budel***, 832 A.2d 1066, 1070 (Pa. Super. 2003); ***Gorski v. Smith***, 812 A.2d 683, 692 (Pa. Super. 2002). A complaint does not need to plead every term of the contract in complete detail, but every element must be specifically pleaded. ***Presbyterian***, 832 A.2d at 1071; ***Corestates Bank, N.A. v. Cutillo***, 723 A.2d 1053, 1058 (Pa. Super. 1999). "When any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written. Pa.R.C.P. 1019(h). "When any claim of defense is based upon a writing, the pleading shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing. Pa.R.C.P. 1019(i).

The adequacy of Kinley's breach of contract claims is dependent on what agreement the claims are based upon. Kinley has pleaded facts that could establish the elements for a breach of contract claim based on a written agreement. The Amended Complaint pleaded the existence of a written agreement between Kinley and SLP Industries and its essential terms.

Kinley pleaded that he and SLP Industries entered into a written agreement whereby SLP Industries agreed to construct residential homes for Kinley and attached a copy of that agreement to the Complaint. Kinley pleaded that he and SLP Industries entered into that written agreement on April 8, 2000. The Amended Complaint pleads a breach of that contract in that SLP Industries failed to construct all the homes required by the contract and the ones that were constructed were deficient. Kinley suffered damages as a result of this breach in that he paid SLP Industries $600,000 to fund the construction, had to expend $110,000 to repair one of the homes that was partially constructed, and will have to further expend money to raze the construction begun on the other lots, so that they may be returned to a usable condition. Therefore, the Amended Complaint has pleaded a cause of action for breach of contract based on the written agreement.

However, the Amended Complaint has not pleaded a cause of action based on an oral agreement. The Amended Complaint asserts that SLP Industries and Calkins breached the agreements they had with Kinley, both written and oral. In Paragraph 6 of the original Complaint, Kinley alleges that Calkins began construction of the residential units partly in accordance with the written agreement and partly in accordance with oral agreements. The only mention in the Amended Complaint regarding the existence of an oral agreement between Kinley and SLP Industries and Calkins is this statement. There are no facts alleged to support the claim that there was such an oral agreement.

Furthermore, the Amended Complaint fails to plead the essential terms of the oral contract. Consequently, it cannot be determined whether the alleged conduct was a breach of that oral agreement and that the damages suffered by Kinley were a result of that breach. As

such the Amended Complaint fails to set forth a breach of contract claim based on an oral agreement. Therefore, the preliminary objections to the breach of contract claims in this regard will be granted.

The Court will now turn to the preliminary objection to the fraud claims. In order to bring a claim for fraud, a plaintiff must establish: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justified reliance on the misrepresentation; (6) the resulting injury was proximately caused by the reliance." ***Gibbs v. Ernst***, 647 A.2d 882, 889 (Pa. 1994); ***Jahanshahi v. Centura Dev. Co.***, 816 A.2d 1179, 1186 (Pa. Super. 2003). Allegations of fraud must consist of more then mere legal conclusions. ***Bash v. Bell Tel. Co. of Pennsylvania***, 601 A.2d 825, 831 (Pa. Super 1992). In pleading a claim for fraud, the allegations in the complaint " '…must adequately explain the nature of the claim to the opposing party *so as to permit him to prepare a defense* and they must be sufficient to convince the court that the averments are not merely subterfuge.'" ***Ibid***. (quoting ***Bata v. Central-Penn Nat'l Bank***, 224 A.2d 174, 179 (Pa. 1966)) (emphasis in original).

Kinley cannot assert a fraud claim against SLP Industries or Calkins. Firstly, Kinley cannot base a fraud claim on the failure to perform future conduct. Secondly, the Amended Complaint does not aver facts that could establish fraudulent intent on the part of SLP Industries or Calkins.

"It is well established that the breach of a promise to do something in the future is not actionable in fraud." ***Shoemaker v. Commonwealth Bank***, 700 A.2d 1003, 1006 (Pa. Super.

1997); *See also*, ***Bash***, 601 A.2d at 832; ***Krause v. Great Lakes Holdings, Inc.***, 563 A.2d 1182, 1187 (Pa. Super. 1989) ("A promise to do something in the future, which promise is not kept, is not fraud."), *app. denied*, 574 A.2d 70 (Pa. 1990). In ***Shoemaker***, the plaintiffs obtained a mortgage on their home from the defendant bank. Under the mortgage agreement, the plaintiffs were required to obtain property insurance on the mortgaged property. ***Shoemaker***, 700 A.2d at 1004. In January 1994, the plaintiffs insurance policy had obtained lapsed. At that time, there was communication between the plaintiffs and defendant bank regarding the need for insurance on the mortgaged property. The plaintiffs contended that it was in this communication that the defendant bank agreed to purchase property insurance and add the price of the premium to the balance of the loan. ***Ibid***. At the time the plaintiffs' home was destroyed by fire in 1995, it was uninsured.

The plaintiffs brought a fraud claim, *inter alia*, against the defendant bank. The issue on appeal was whether the trial court erred in granting the defendant bank's motion for summary judgment on the fraud claim. The plaintiffs asserted that the defendant bank represented to them that it would purchase insurance on the mortgaged property and that the cost would be included in the cost of the mortgage. ***Shoemaker***, 700 A.2d at 1005. The Superior Court held that the trial court did not err in granting summary judgment. The Superior Court noted that the plaintiffs were basing their fraud claim on the defendant bank's alleged promise to purchase insurance on the property if the plaintiffs failed to do so. ***Ibid***. The Superior Court stated that this alleged promise could not form the basis of a fraud claim because it was a promise to take future action. ***Ibid***.

Similarly, Kinley basis his fraud claims on a promise to take future action. The alleged representation is that SLP Industries and Calkins promised to perform residential construction for Kinley. This representation relates to the performance of future conduct, i.e. construction of the residences on the Beauty Run lots, and as such cannot form the basis of a fraud claim. Therefore, the preliminary objection must be granted.

The Amended Complaint is also deficient as to the fraud claims because it fails to aver facts to establish an intent to defraud. " '[A]n unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made.'" ***Bash***, 601 A.2d at 832 (quoting ***Fidurski***, 195 A. at 4.). In ***Bash***, the plaintiff had contracted with the defendants for yellow pages directory advertising. The advertisements had not been published. ***Id***. at 826. The plaintiff asserted, *inter alia*, a fraud claim against the defendants.[3]

The Superior Court held that the complaint failed to assert a claim for fraud against the defendants. ***Bash***, 601 A.2d at 832. The Superior Court stated that the complaint failed to allege facts that could establish an intent to induce. The complaint alleged that the defendants falsely represented that they would provide the advertisements contracted for and it would be done in a workmanlike manner. The complaint further alleged that the defendants "… have had, into the presently unknown past, specific knowledge of their errors and omissions, akin to those described more fully hereinabove …" and recklessly disregarded the rights and economic

[3] Originally, the plaintiff had asserted a claim based on a violation of the Unfair Trade Practices Act, 73 Pa.C.S.A.§201-1, *et seq*. The plaintiff never moved to amend his complaint to include a fraud count, but attempted to retitle the Unfair Trade Practices Act count as a fraud count in his answer to the preliminary objections. ***Bash***, 601 A.2d at 830. In its supplemental memorandum of law in support of its preliminary objections, one of the defendants treated the answer as a request for leave to amend. The defendant did not object to the amendment, but argued that the pleading lacked the specificity to establish a fraud claim. ***Id***. at 831. The Superior Court undertook to analyze the complaint to determine if the count had been retitled as a fraud count whether the complaint stated a cause of action for fraud. ***Ibid***.

interests of the plaintiff, and others similarly situated to the plaintiff, by failing to ensure that reasonable steps would be taken to provide the advertisement services contracted for, but instead improperly relied on the disclaimer clause of the written advertising agreement. ***Id***. at 831-32.

The Superior Court held that the defendant's failure to act according to its representation that it would publish the advertisements, without more, did not rise to the level of fraud. ***Bash***, 601 A.2d 832. This is because an unperformed promise does not give rise to a presumption that the defendant did not intended to perform when the promise was made. As would relate to the allegations concerning the defendants' knowledge of its past inability/unwillingness to perform per agreements, the Superior Court found them to be vague and general averments that did not permit the defendants to prepare an adequate defense. The Superior Court further noted that the complaint failed to allege facts which would demonstrate that the defendants did not intend to perform the agreement when it was entered into. ***Ibid***., n.6.

Similarly, Kinley has failed to allege facts that could establish an intent to induce on the part of SLP Industries or Calkins. The facts alleged in the Amended Complaint propound the theory that SLP Industries and Calkins should be liable for fraud because they failed to perform the representation that they would construct residential homes for Kinley. However, this alone does not establish an intent to induce since the failure to perform a promise does not give rise to the presumption that SLP Industries or Calkins did not intend to perform the agreement at the time it was entered into. ***Bash***, 601 A.2d at 832. The Amended Complaint alleges that SLP

Industries and Calkins took the money from Kinley for the construction, but "… had no intention of performing the residential construction properly and promptly." Amended Complaint, ¶ 3. The Amended Complaint contains no factual averments that could support this assertion. The Amended Complaint is devoid of any factual allegation that SLP Industries or Calkins made false representations to induce Kinley to enter into the agreement. Therefore, the Amended Complaint fails to state a cause of action for fraud.

Accordingly, the preliminary objection to the fraud claim is granted.

The last preliminary objection concerns the breach of contract and fraud claims asserted against Calkins individually. Since the Amended Complaint fails to set forth a cause of action for fraud, the Court will not address whether Kinley can assert a fraud claim against Calkins individually since it is a moot issue. The Court will only address whether an individual claim can be asserted against Calkins for breach of contract.

In a breach of contract claim, the burden is on the plaintiff to prove by a preponderance of the evidence the existence of a contract and that the defendant is a party to that contract. ***Viso v. Werner***, 369 A.2d 1185, 1187 (Pa. 1977). In general, " '[w]henever a corporation makes a contract, it is the contract of the legal entity of the artificial being created by the charter, and not the contract of the individual members.' " ***Wicks v. Milzoco Builders, Inc.***, 470 A.2d 86, 89 (Pa. 1983) (quoting ***Bala Corp. v. McGlinn***, 144 A. 823, 824 (Pa. 1929)) (change in original). Pennsylvania law is clear that "…where a party enters into a contract with a corporation, no action will lie against the shareholders of that corporation individually for a breach of that contract." ***First Realvest, Inc. v. Avery Builders, Inc.***, 600 A.2d 601, 603 (Pa. Super. 1991); ***Loeffler v. McShane***, 539 A.2d 876, 879 (Pa. Super 1988). " '[T]he breach of

the contract is the breach of a promise made by the corporation, and not the breach of any promise extended by the corporate officer.'" ***First Realvest***, 600 A.2d at 603 (quoting ***Loeffler***, 539 A.2d at 879).

However, a corporate officer may still be held personally liable for breach of contract under two theories – individual capacity and piercing the corporate veil. "A corporate officer is of course liable for the breach of any promises or representations which he extends not in his capacity as an officer but personally in his individual capacity." ***Loeffler***, 539 A.2d at 879, n. 3. In this regard, recovery cannot be had against one who is not a party to a contract, but only signed it on behalf of his disclosed principal. ***Viso***, 369 A.2d at 1187. " 'An authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party.'" ***Ibid***. (quoting ***Geyer v. Huntingdon County Agricultural Assoc.***, 66 A.2d 249, 250 (Pa. 1949)). "If the alleged contract is in the name of the agent, but the name of the principal is disclosed, there exists a strong presumption that it is the intention of the contracting parties that the principal and not the agent should be a party to the contract." ***Ibid***. "Admittedly, the mere signature of the appellant preceded by the word "by" and following the typed name of the corporation on the corporation's letterhead is not conclusive that he was acting in a representative capacity, if the alleged contract showed an intent to bind appellant individually." ***Id***. at 1188.

The Amended Complaint fails to allege facts which could support the conclusion that Calkins entered into the agreement individually. The Amended Complaint alleges that Kinley and SLP Industries entered into the agreement on April 8, 2000. An examination of the written agreement would indicate that it was between SLP Industries and Kinley and that Calkins was

not a party thereto. The top portion of the written agreement contains what can be described as SLP Industries' letterhead. The written agreement states "Between SLP Industries, Inc. and Mr. Kinley." The written agreement only makes reference to SLP Industries and Kinley and what is required of them under the contract. Calkins is not mentioned at all in the body of the agreement. His name only appears as a signatory at the end of the contract. Calkins signed the written agreement as President for SLP Industries, and this was clearly indicated.

The Amended Complaint does not aver any facts that would alter the conclusion reached by examining the written agreement. The mere fact that Calkins was the sole shareholder, director, and officer of SLP Industries does not mean that he entered into the contract individually. *See*, ***Viso***, 369 A.2d at 1188 ("The fact that stock is closely held or even held by one stockholder should not, in itself, alter the proposition that the corporation is distinct from its shareholders."). Therefore, the Amended Complaint does not allege facts which could establish that Calkins entered into the written agreement in his individual capacity.

The second theory by which a corporate officer may be held individually liable for a breach of contract is piercing the corporate veil. "[I]f a corporate officer is also a shareholder in the corporation, in appropriate circumstances, he may be held individually liable under the equitable doctrine of piercing the corporate veil." ***Loeffler***, 539 A.2d at 879, n. 3. " 'There is a strong presumption in Pennsylvania against piercing the corporate veil.'" ***Advanced Tel. Sys. v. Com-Net Prof'l Mobile Radio, LLC***, 846 A.2d 1264, 1278 (Pa. Super. 2004) (quoting ***Wedner v. Unemployment Bd.***, 296 A.2d 792, 794 (Pa. 1972)), *app. denied*, 859 A.2d 767 (Pa. 2004). The general rule is that a corporation shall be regarded as an independent entity even if one person owns its stocks. ***Ibid***. " 'Nevertheless, a court will not hesitate to treat as identical

the corporation and individual owning all its stock and assets whenever justice and public policy demand and when the rights of innocent parties are not prejudiced thereby nor the theory of corporate entity made useless.'" ***Ibid***. (quoting ***Good v. Holdstein***, 787 A.2d 426, 430 (Pa. Super. 2001)).

There is no definitive test for determining when the corporate veil should be pierced. ***First Realvest***, 600 A.2d at 604. Courts should start from the general rule that the corporate entity should be recognized and not disregard absent unusual circumstances that call for an exception. ***Ibid***. The corporate form " …will be disregarded only when it is used to defeat public convenience, justify wrong, perpetrate fraud, or defend crime." ***Brindley v. Woodland Village Restaurant***, 652 A.2d 865, 867 (Pa. Super. 1995); ***First Realvest***, 600 A.2d at 604. In sum, the corporate entity will be " '…disregarded whenever it is necessary to avoid injustice.'" ***Village at Camelback Property Owners Ass'n v. Carr***, 538 A.2d 528, 533 (Pa. Super. 1988) (quoting ***Rinck v. Rinck***, 526 A.2d 1221, 1223 (Pa. Super. 1987)), *aff'd*, 572 A.2d 1 (Pa. 1990). There are two theories under which the corporate veil may be pierced.

The first is the alter ego theory. The alter ego theory applies when the individual or corporate owner controls the corporation and the controlling owner is to be held liable for the claim or debt. ***Advanced Tel. Sys.*** 846 A.2d at 1278; ***Miners, Inc. v. Alpine Equip. Corp.***, 722 A.2d 691, 695 (Pa. Super. 1998), *app. denied*, 745 A.2d 1223 (Pa. 1999). The factors to be considered when determining when to disregard the corporate form are: undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetuate a fraud. ***Ibid***.

The second is the enterprise or single entity theory. This theory applies when "…two or more corporations share common ownerships, and are, in reality, operating as a corporate combine." ***Miners***, 772 A.2d at 695. Under this theory, "… two or more corporations are treated as one because of identical ownership, unified administrative control, similar or supplementary business functions, involuntary creditors, and insolvency of the corporation against which the claim lies." ***Ibid***. However, it should be noted that the enterprise/single entity theory has yet to be adopted in Pennsylvania. ***Ibid***; *See also*, ***Advanced Tel. Sys.***, 846 A.2d at 1278, n.9.

The Amended Complaint does not allege sufficient facts that would permit the corporate veil to be pierced. The Amended Complaint advances the participation theory as a basis to find Calkins individually liable for the breach of contract. However, as will be discussed *infra*, the participation theory does not apply to breach of contract actions. The only allegations that resemble an attempt to advance an alter ego theory are:

> Defendant Calkins is the sole Shareholder, Director and Officer of Defendant Corporation to the best of Plaintiff's knowledge, and was solely responsible for all financing and construction activities of Defendant corporation and made all material representations personally with respect to the allegations Plaintiff sets forth in this Complaint. Further, in the alternative, upon information and belief, the conduct hereinafter attributed to Defendants was performed by Defendant Calkins, ultra vires to the Defendant corporation and for his individual benefit.
>
> All disbursements and decisions with respect to the use of said funds advanced by Plaintiff were made by Defendant Calkins.

Complaint, ¶¶5, 8. The allegations do not establish that the corporation was the alter ego of Calkins. The mere fact that Calkins was the sole shareholder, director, and officer of SLP

Industries does not necessitate that the corporate entity be disregarded. Nor does the fact that Calkins may have made all disbursements and decisions concerning the funds transferred from Kinley. Therefore, Kinley has failed to allege facts that would permit him to pierce the corporate veil under an alter ego theory.

Instead, the allegations in the Amended complaint demonstrate an attempt to put forth a participation theory of liability. There is a distinction between the piercing the corporate veil and participation theory:

> '… Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore, its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity.'

Brindley, 652 A.2d at 868 (quoting ***Wicks***, 470 A.2d 89-90). Under the participation theory, a corporate officer is liable for misfeasance, the improper performance of an act, but not for nonfeasance, the omission of an act a person ought to do. ***Loeffler,*** 539 A.2d at 878.

The participation theory cannot be used as a basis for bringing a breach of contract claim against an individual corporate officer because it does not surmount the obstacle of the general rule that " '[w]henever a corporation makes a contract, it is the contract of the legal entity of the artificial being created by the charter, and not the contract of the individual members.' " ***Wicks***, 470 A.2d at 89 (quoting ***Bala Corp.***, 144 A. at 824.).[4] Under the

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[4] This is not to say that a corporate officer is not immune from liability for his actions regarding a corporation's contract. There is the possibility of brining a tortuous interference with a contract claim against the corporate officer. *See, e.g.*, ***Reading Radio, Inc. v. Fink***, 833 A.2d 199, 211 (Pa. Super. 2003) (To bring a tortuous interference with a contract claim a plaintiff must establish: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the

participation theory, the corporate entity still exists. Consequently, the fact that the contract was entered into by the corporation and the plaintiff still exists. This means that the corporate officer was not a party to the contract; therefore, he cannot be held liable for a breach of that contract. Contrast this with the alter ego theory, which does away with the corporate entity. In that situation, the court pierces the corporate veil and the corporate officer is liable because "… the corporation is not a bona fide independent entity … [and] … its acts are truly his." ***Wicks***, 369 A.2d at 89. There the corporate officer would be entering into the contract and be a party thereto, which would subject him to liability for a breach of that contract.

Since Kinley has based the breach of contract claim against Calkins on the participation theory, the Amended Complaint fails to allege facts that could establish the claim. As such, the preliminary objection to the breach of contract claim asserted against Calkins is granted.

Accordingly, the preliminary objections are granted in part and denied in part.

ORDER

It is hereby ORDERED that the Preliminary Objection of Defendants SLP Industries, Inc. and Dennis P. Calkins filed July 9, 2004 shall be DENIED IN PART and GRANTED IN PART.

The Preliminary Objections are DENIED in that Plaintiff Robert J. Kinley has pleaded sufficient facts to bring a breach of contract claim against SLP Industries, Inc based upon the written Agreement dated April 8, 2000 and attached to the original Complaint.

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defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damages as a result of the defendant's conduct.). In this situation, the participation theory would be applicable.

The Preliminary Objections are GRANTED in that Kinley has failed to allege facts that could support a breach of contract claim against SLP, Industries, Inc. and Dennis P. Calkins based upon oral agreements.

The Preliminary Objections are GRANTED in that Kinley has failed to allege facts that could support a fraud claim against SLP, Industries, Inc. and Dennis P. Calkins.

The Preliminary Objections are GRANTED in that Kinley has failed to allege facts that could establish a breach of contract claim against Calkins individually.

Kinley shall have twenty (20) days from notice of this Order to file an Amended Complaint consistent with the Opinion of this Court, which accompanied this Order.

BY THE COURT:

William S. Kieser, Judge

cc: Michael J. Casale, Jr., Esquire
Ernest D. Preate, Jr., Esquire
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