JEFFERSON DISTRICT COURT, JEFFERSON COUNTY, COLORADO Court Address: 100 Jefferson County Pkwy. Golden, CO 80401	DATE FILED: December 7, 2021 3:46 PM CASE NUMBER: 2019CV31197
Plaintiff: **4240 KIPLING, LLC** and Defendants: **TOP THAT COMMERCIAL ROOFING, INC., PHIL THERIAULT, and TIMOTHY DEGROOT**	**▲ COURT USE ONLY ▲**
	Case Number: 2019CV31197 Division: 5
ORDER: OPINION	

THIS MATTER comes before the Court following Plaintiff's Complaint for fraud, breach of contract - specific performance, unjust enrichment, negligent misrepresentation, and breach of contract – recession. A trial to the Court was held on June 30, 2021 and July 1, 2021. Defendant Timothy DeGroot failed to appear for trial and a default was entered against him. The Court heard testimony from Dylan Armbrust and Jeffrey Dopp, for Plaintiff; and from Philip Theriault, for Defendants. The Court received into evidence Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 11, and 14A, pages 271 – 272. The videotaped deposition of Benjamin T. LeRoy was noticed to all parties on May 6, 2021. The deposition of Mr. LeRoy was taken on May 19, 2021. The parties

attended and participated in this deposition. The attending parties stipulated at the beginning of the deposition that said deposition could be used in lieu of live testimony from Mr. LeRoy because the witness would not be available at trial.

After considering all of the testimony and the exhibits that were admitted into evidence, the Court hereby enters the following findings of fact, conclusions of law, and judgment.

I. INTRODUCTION

Plaintiff 4240 Kipling, LLC ("4240") is a Colorado limited liability company. Its primary business is the ownership and management of the commercial building located at 4240 Kipling Street, Wheat Ridge, CO 80033. The building has multiple tenants, but the primary tenant is Armbrust Pro Gym ("the gym"). 4240's principals were Dylan Armbrust ("Armbrust") and Brian Leben ("Leben").

Defendant Top That Commercial Roofing, Inc. ("Top That") is a Colorado for profit corporation that maintains its primary place of business at 7348 South Alton Way, Suite 9-I, Centennial CO, 80112. Top That's primary business is the provision of construction, maintenance and repair services focused on residential and commercial roofs. Defendant Phil Theriault is the President, director and owner of all the shares of Top That. Defendant Timothy DeGroot served as a Project Manager for Top That. He was also a member of the gym.

The roof of 4240's building was damaged by hail on May 8, 2017. Representatives of the parties met several times in the summer of 2017. As a result, Defendants performed certain work on Plaintiff's roof.

Based upon the agreement and subsequent work, Plaintiffs filed claims for relief, including for fraud, breach of contract- specific performance, unjust enrichment, negligent misrepresentation and breach of contract – rescission.

The issues dispositive to the case are what the parties agreed to at the meetings in the summer of 2017, whether the work performed was the same as the work agreed

upon in those meetings, and whether the work performed was worth the $143,635.63 charged by Defendants.

II. FACTS

Following the hail storm on May 8, 2017, Leben filed a claim with 4240's insurance carrier, Travelers Insurance (Travelers).

DeGroot was not only a member of the gym at 4240 but was also on friendly terms with Armbrust. Shortly after the storm, DeGroot approached Leben and Armbrust and advised them he was certain 4240's roof had been damaged by the May 8, 2017 hail storm. DeGroot requested and received permission to inspect 4240's roof. After inspecting 4240's roof, DeGroot reported that the roof had been heavily damaged by the May 8, 2017 hail storm and needed to be replaced, including the ISO board.

On July 3, 2017, Leben signed two documents. The first document, entitled "Permission to Communicate," stated*, inter alia*, that 4240 authorized Travelers to communicate directly with Top That "regarding the scope of work to be performed and all necessary components to complete work meeting code requirements and in a workmanlike manner."

The second document, entitled "Agreement," represented that Top That would aid in the process of 4240's insurance claim with Travelers to ensure it was properly scoped and estimated. The agreement further provided that in consideration for Top That's aid in ensuring the insurance claim was properly estimated, 4240 agreed to use Top That as the contractor for the work associated with the insurance claim.

DeGroot texted Armbrust on August 8, 2017. Those texts notified Armbrust that Theriault and DeGroot wanted to meet with Armbrust the next day to go over the roof and schedule the initiation of work on 4240's roof for the next week. Over the course of several months, Top That worked on 4240's roof, represented that it had completed the job, and was paid the full $143,635.83.

On March 27, 2018, DeGroot agreed to inspect 4240's roof after receiving complaints by Armbrust that the roof was leaking. DeGroot explained to Armbrust after

his inspections that the roof was not leaking. Rather, the water accumulation was due to water coming into certain pipes and was not due to a problem with the roof.

Plaintiff had a clause in their insurance contract which would have allowed them to collect $31,000 in recoverable depreciation had their roof been replaced.

A. <u>August 2017 Meeting</u>

Critical to determination of the issues in the case is the date of the meeting between the parties in August 2017. Armbrust testified that on August 9, 2017, he met with Theriault and DeGroot at the gym. At that meeting, Theriault and DeGroot told him that in exchange for payment of $143,635.83, Top That would tear off and replace 4240's hail damaged roof, and that Plaintiff would not have to pay an out of pocket deductible. Based upon that discussion, Armbrust testified that he approved Top That to do the work. Armbrust further testified that the next day, August 10, 20217, DeGroot came by with a blank contract form. During that brief follow-up meeting, lasting about four minutes, Armbrust testified that he signed the form (Ex. 5). According to Armbrust, it was not filled out; specifically, there were no handwritten statements on the document. Armbrust testified that he signed the document because he thought it was in furtherance of his conversation with Defendants the day before.

Conversely, Theriault testified the meeting took place on August 10, 2017. He stated that Armbrust told him that Armbrust did not want to pay the deductible, and that Armbrust was not concerned with what Top That did, so long as Armbrust did not have to pay anything out of pocket. According to Theriault, he explained to Armbrust that Top That could perform a silicone spray coating as an alternative to a roof tear off and replacement, and that this was a good alternative because of its seamless application and because Top That could do the job for the amount Travelers paid to 4240. Theriault testified that he filled in the handwritten portions of Exhibit 5, and that he witnessed both Mr. Armbrust and Mr. DeGroot sign in his presence. He testified there was no doubt in his mind that Mr. Armbrust signed a fully completed copy of Exhibit 5.

The Court finds Armbrust's testimony to be more credible. The Court bases this determination upon carefully considering Armbrust's and Theriault's motives, demeanor,

and manner while testifying, and upon corroboration of the parties' testimony by the evidence in the case.

Armbrust's testimony is corroborated by the text from DeGroot to Armbrust on August 8, 2017 (Ex 7, p. 21), asking for a meeting the next day with Theriault, DeGroot and Armbrust; Armbrust's return text confirming the meeting at 11:00 a.m. the next day; and by the fact that there are no texts changing the time of the meeting.

Further, the evidence shows that on August 10, 2017, Armbrust texted DeGroot that he "has the itemized insurance quote you wanted" and asks to email it to DeGroot. (Id., at p.23). The Court can reasonably infer that there likely would have been no need for Armbrust to email that document to DeGroot if they were scheduled to meet that day.

On August 10, 2017, DeGroot texted Armbrust asking him if he is at the gym and that "I have the contract for the gym roof so we can start next week." (Id., at p. 24). This text is consistent with Armbrust's testimony that the meeting at which terms were agreed to took place the previous day and that DeGroot came to him on an unscheduled visit the evening after the meeting, while Armbrust was working with a third person preparing a podcast. At that time, Armbrust testified that DeGroot asked Armbrust to sign two blank documents, claiming they were just work orders that would allow DeGroot to keep the project moving. The Court finds that at that brief, unscheduled meeting, DeGroot presented Exhibit 5 to Armbrust for signature. Although it was not filled out, the Court finds, Armbrust signed it without paying it much heed, believing it was in furtherance of the discussions the previous day. The Court finds credible that Armbrust was distracted by his work on the podcast, and that his signing the blank document was consistent with the inference that Armbrust knew DeGroot and thus trusted him.

For these reasons, the Court finds that the meeting between Armbrust, Theriault and DeGroot took place on August 9, 2017.

B. <u>Nature of the Agreement</u>

At the August 9, 2017 meeting, Armbrust testified that Theriault and DeGroot told him that in exchange for payment of $143,635.83, Top That would tear off and replace 4240's hail damaged roof, and that Plaintiff would not have to pay an out of pocket deductible. Based upon Defendants' statements, Armbrust testified that he approved Top That to tear off the old roof and replace it with a new roof.

Theriault denies that he ever agreed to remove the existing roof and replace it with a new roof at that meeting. Theriault testified that Top That had put together an estimate for $310,350.57 for a full tear off and replacement. He had reviewed Traveler's estimate, which was significantly lower than Defendants' estimate, and still needed to account for the fact that Travelers had mis-measured the area of the roof and for the ISO board upgrade required by the City of Wheat Ridge. But since Travelers would not agree to pay a higher amount, Defendants could not perform a tear off and replacement. Defendants assert that Armbrust told Defendants that he could not afford to pay the deductible amount, but nevertheless wanted the roof to be repaired and thus agreed to a patch and silicone seal instead.

Defendants argue that Armbrust did not sign any blank documents, and that the August 10, 2017 contract (Ex. 5) was completed in full before it was signed by the parties. Thus, Defendants argue that they performed their end of the bargain and are not liable.

By its terms, Plaintiff's Exhibit 5 provides that only when Travelers and Top That agree upon a price will that price become final and Top That eligible to receive insurance proceeds for the work. Yet Travelers adjuster Benjamin LeRoy (LeRoy) confirmed that Travelers never approved Top That's estimate or agreed to the price identified in Exhibit 5. (LeRoy depo at p. 19:5- p. 20:10).

In fact, beginning in March 2018, LeRoy began asking Top That to provide a copy of the final invoice for the work performed on Plaintiff's roof. While Exhibit 5, if it had been completed and signed on August 10, 2017 as asserted by Defendants, would have served that purpose, the Court finds that DeGroot initially stalled. Only after several requests from Travelers from March 2018 to June 2018, did DeGroot finally

inform LeRoy that no invoice would be provided. (LeRoy depo at p. 11:23- 13:13; p. 14:8-18; p. 15:14-22; Ext 8, p. 126 - 127).

In fact, Exhibit 5 was not produced by Defendants until September 2018. The Court finds that this supports Plaintiff's claim that Defendants were seeking to conceal the fact that they did not perform the promised work and instead, simply patched and sealed the existing roof, then filled in blank portions of Exhibit 5 accordingly.

On August 6, 2018, LeRoy spoke to someone from Core Contractors Roofing Supply who had completed a core sample on the roof and believed the damaged roof was still in place with a silicone layer on top. (Ex. 8, p. 130). LeRoy then inspected the roof himself and determined the roof indeed had not been replaced. (LeRoy depo at p. 16:11-21).

All of this corroborates Armbrust's testimony. Additional evidence of the parties' agreement is the July 24, 2017 texts from DeGroot to Armbrust that state that "Your roof is getting replaced." (Ex. 7 at p. 16).

Based upon the credible testimony of Armbrust, the findings of fact, and the reasonable inferences therefrom, the Court finds that at the August 9, 2017 meeting, Armbrust, on behalf of 4240, contracted with Defendants to tear off the original roof and replace it with a new roof system for the price of $143,635.63. The Court further finds that Theriault and DeGroot knew they could not replace Plaintiff's roof at that price, given their previous estimate (Ex. 3), but told Armbrust that they would do so, intending instead to only patch and coat the roof. Finally, the Court finds that Armbrust based his decision to contract with Top That on representations made by Theriault and DeGroot that they could replace the roof for $143,635.63.

Defendants assert that at the August 2017 meeting, it would have been impossible for Top That to represent it would tear off and replace the roof, since Travelers's estimate did not include the ISO board upgrade cost. But the Court finds that it would not be impossible for Defendants to make such a representation if they intended to instead patch the roof and coat it with silicone without disclosing that intention to Armbrust. Indeed, that is the thrust of Plaintiff's case.

C. Quality of the Work

The Court heard the testimony of Jeffery Dopp (Dopp), Plaintiff's expert, regarding the quality of Defendants' work. Defendants argue that the Court should disregard the testimony of Dopp, since he did not know the scope of the parties' agreement, the terms of the insurance policy, the deductible, or the cost upgrade limitation. Defendants assert that without knowledge of the facts leading up to the parties' agreement, Dopp's testimony does not establish any liability for either Top That or Theriault.

Defendants also argue that Top That obtained approval from Josh White, a Gaco representative, for a second opinion regarding use of a silicone foam spray coating on Plaintiff's roof. According to the testimony of Theriault, Josh White came out, examined the roof, and told Theriault it was a good candidate for the silicone spray.

At trial, Dopp testified that he had been a commercial roofer for 18 years when Plaintiff asked him to repair leaks in their roof in fall 2018. He has hands-on experience with Plaintiff's roof type, as well as experience overseeing work on this type of roof, and additional experience through sales, inspections, and business development. He testified he did not know any of the "backstory" about the roof when he arrived.

The Court found Dopp's testimony credible. The Court bases this determination upon carefully observing his motives, demeanor, and manner while testifying. While he may not have known the terms of the agreement or policy, the Court finds that this neutrality enhances rather than detracts from his credibility.

Contrary to Theriault's testimony regarding the second opinion he received from Josh White, Dopp testified that Plaintiff's roof was not an appropriate candidate for a re-coat. He said that upon inspecting Plaintiff's roof in fall 2018, he found hail damage to the rubber membrane and multiple water intrusions that pre-existed the silicone coating installed by Defendants.

Much of that pre-existing damage had not been repaired by Defendants. The damage that had been repaired was not repaired using required EPDM patches. The leaks that Plaintiff complained of after Top That's work, according to Dopp, were due to Top That's failure to make the required repairs before applying the silicone on top.

Dopp testified that the roof coating was also not properly attached, causing peeling and a risk that it will be lifted by wind. The Court received photographs as evidence that Defendants had not replaced the soft metal parts of the roof, such as the roof cap and the tops of exhaust pipes. (Ex. 11 at pages 192, 196, 215 and 216). Dopp also found significant the fact that Defendants' work had not been warrantied.

Dopp testified that in his opinion, Defendants' focus was on profit rather than what was required to fix the roof. Dopp testified that Defendants' "shoddy job" could not be salvaged, and that the roof needed to be torn off and replaced. His opinion was supported by the photos of the completed roof. (Id.).

D. Cost of the Work

Dopp testified that if he had recoated the roof, he would have charged between $85,000 and $95,000. In his testimony, he settled on an estimated charge of $88,500 and noted that this price would be for work that was superior in quality to Defendants' work. He stated that by charging $143,635.83 for this work, Defendants had grossly overcharged.

This testimony is supported by LeRoy. He testified that a reasonable price would have been around $60,000 to $70,000. (LeRoy depo at p. 17:20- p. 18:12).

E. Plaintiff's Response and Complaint

On August 2, 2019, Plaintiff filed the complaint in this case asserting five claims: (1) deceit based on fraud – false representation; (2) deceit based on fraud – nondisclosure or concealment; (3) breach of contract; (4) Unjust enrichment; (5) negligent misrepresentation – alternative claim; (6) breach of contract – alternative claim.

On September 6, 2019, Plaintiff filed an amended complaint for damages. The amended complaint for damages seeks an award of damages sufficient to make 4240 Kipling, LLC whole, as requested in the first, second, fourth and fifth claims for relief, and as alternatively requested in the third claim for relief; (2) specific performance of the contract, as requested in the third claim for relief; (3) alternatively, rescission of the contract represented by Exhibit 4, as requested in the sixth claim for relief; (4) an award of pre-judgment interest; (5) an award of post-judgment interest; (6) an award of costs; and (7) such further and appropriate relief as this Court may deem appropriate.

Defendants filed an answer to the amended complaint for damages on October 23, 2019, denying the allegations and asserting several affirmative defenses. A stay pursuant to C.R.S. § 13-20-803.5(9) was granted on November 6, 2019. That stay was lifted on February 3, 2020, and litigation was resumed in the case. A written Motion of Withdrawal regarding Defendant DeGroot was filed on November 3, 2020 and was granted on November 19, 2020.

A Suggestion of Bankruptcy was filed on November 9, 2020. After briefing by the parties, the case was stayed by the Court on November 11, 2020, pending resolution of the bankruptcy proceedings. That stay was lifted on March 17, 2021, and litigation in the case again resumed. Defendant Theriault's Motion for Leave to File Out of Time Motion for Summary Judgement and Motion for Summary Judgement were denied on May 24, 2021. On June 30, 2021, Default Judgement was entered against Defendant DeGroot.

A two-day bench trial was completed on June 30–July 1, 2021.

III. PRELIMINARY ISSUES

A. Defendant Theriault's Claim Regarding Individual Liability

Defendant Theriault asserts that he is entitled to judgment in his favor because there is no genuine issue as to any material fact that he is individually liable on any of Plaintiff's claims. Defendant Theriault argues that he acted as a disclosed agent of Top That and the Court is not justified in disregarding the corporate entity to impose

personal liability. Defendant also argues that under the Law of the Case Doctrine, the Court is generally required to follow its prior relevant rulings.

Plaintiff argues that Theriault is subject to individual liability with respect to the first claim for relief (deceit based on fraud- false representation), the second claim for relief (deceit based on fraud- nondisclosure or concealment), the fourth claim for relief (unjust enrichment), and the fifth claim for relief (negligent misrepresentation).

The Court will first address Defendants' argument that the Law of the Case doctrine should be applied to preclude individual liability on behalf of Theriault.

1. Law of the Case Doctrine

A pronouncement of an appellate court on an issue in a case presented to it, as well as rulings logically necessary to the holding of the appellate court, become the law of the case, and must be followed by the trial court. *People v. Roybal*, 672 P.2d 1003 (Colo. 1983). Although a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed. The law of the case doctrine is applied unless it results in error or is no longer sound due to changed conditions. *People Ex Rel. Gallagher v. District Court*, 666 P.2d 550 (Colo. 1983).

Here, the Court remarked in its November 17, 2020 Order on the Suggestion of Bankruptcy that the claims against the individual defendants are based on the same operative facts and arise from their capacity as representatives of Top That. The Court found "Plaintiff has made no argument to the Court that compels it to believe that the individual defendants should be personally liable in this matter." Defendants argue that this Court should be bound by that ruling.

The case rests now, however, in a very different procedural posture than it did in November 2020. The most salient difference is the fact that a trial has been held on the merits and the Court has available to it two days of sworn testimony and exhibits, offered during the trial, much of which were not available to it at the time it issued its November 17, 2020 Order. In addition, the issues at trial are different than the issues addressed by the Court in its November 2020 Order. Given these changed circumstances, the Court finds its previous ruling would no longer be sound and the

Court will not be bound by its previous ruling on November 17, 2020 as it applies to the claims at trial.

The Court next turns to the merits of Defendant Theriault's argument that he is not personally liable. It will first address Theriault's personal liability under the breach of contract claims, then turn to the claims in tort.

2. Breach of Contract Claims

In its inquiry, the Court recognizes that a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract. *Tatten v. Bank of America Corp*., 912 F.Supp.2d 1032, 1039 (D. Colo. 2012) (citing Restatement (Second) of Agency §320). Such an agent is not personally liable under the contract. *Id*.

Here, there is no dispute that Theriault acted as a disclosed agent of Top That, and he is not a party to the contract. The breach of contract claims assert only an alleged breach of contract by Top That, not that Theriault breached the contract by using the corporate form of Top That. As to the breach of contract claims, the Court finds they were acts of Top That. As such, the Court finds that Theriault is not personally liable, and claims three and six are dismissed as to Defendant Theriault only.

3. Claims in Tort

The second area of inquiry is whether Theriault is individually liable on any of Plaintiff's tort claims. In its analysis, the Court recognizes that corporations that are duly formed entities should generally be treated as a separate legal personality because "[i]nsulation from individual liability is an inherent purpose of incorporation." *Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003); *see also, Micciche v. Billings*, 727 P.2d 367, 372 (Colo. 1986)(citing Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 Den. L.J. 1 (1978)). As such, the "entity veil" will only be disregarded in unusual circumstances, such as when it has been abused or disregarded by the entity's constituents or has been used to perpetrate a wrong. *Leonard* supra; *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1004 (Colo. 1998); *Sheffield Servs. Co. v.*

Trowbridge, 211 P.3d 714, 721-22 (Colo. App. 2009) (applying veil piercing to manager of limited liability company); *Micciche* supra, at 373.

Corporate officers occupy the position of agents in relation to third persons dealing with the corporation. *Leonard v. McMorris*, 63 P.3d 323, 360 (Colo. 2003). It is "'an extraordinary remedy' and only limited circumstances justify disregarding the entity's form to impose liability on LLC members." *Griffith v. SSC Pueblo Belmont Operating Co*., 381 P.3d 308, 313 (Colo. 2016) (quoting *In re Phillips*, 139 P.3d 639, 647 (Colo. 2006). Corporate officers occupy the position of agents in relation to third persons dealing with the corporation. *Leonard*, 63 P.3d at 330. Therefore, personal liability of officers is governed by principles of agency law. *Id*.

The standard of proof in an action to pierce the entity veil is a preponderance of the evidence, not a higher standard such as clear and convincing evidence. *McCallum Family LLC v. Winger*, 221 P.3d 69, 72 - 72 (Colo. App. 2009).

Under these principles, the Court must first inquire into whether the entity is the *alter ego* of the shareholders or members. An *alter ego* relationship exists when the entity is a "mere instrumentality for the transaction of the shareholders' own affairs, and there is such unity of interest in ownership that the separate personalities of the corporation and the owners no longer exist." *Krystkowiak v. W.O. Brisben Co., Inc.*, 90 P.3d 859, 867 n.7 (Colo. 2004) (internal quotations omitted) (quoting *Gude v. City of Lakewood*, 636 P.2d 691, 697 (Colo. 1981)).

In making this determination, the Court considers a number of factors:

> whether (1) the corporation is operated as a distinct business entity, (2) funds and assets are commingled, (3) adequate corporate records are maintained, (4) the nature and form of the entity's ownership and control facilitate misuse by an insider, (5) the business is thinly capitalized, (6) the corporation is used as a "mere shell," (7) shareholders disregard legal formalities, and (8) corporate funds or assets are used for non-corporate purposes.

In re Phillips, 139 P.3d 639, 644 (Colo. 2006)(citations omitted).

Here, the Court finds that Top That was operated as a distinct business entity. There was no evidence of comingling of funds or assets, lack of adequate record-keeping, or that it was thinly capitalized. Top That was not a one-man operation; Armbrust communicated primarily with DeGroot, not Theriault. And Top That's estimate (Ex. 3) was prepared by an employee of Top That, not Theriault.

Thus, the Court is unable to find by a preponderance of the evidence that Top That was merely an *alter ego* of Theriault; nor was it a "mere shell." The Court will therefore not disregard Top That's form to impose liability on Theriault personally under this first inquiry.

The Court's second inquiry, then, is whether justice requires disregarding the entity form and recognizing the substance of the relationship between the entity and the member because the entity form was "used to perpetrate a fraud or defeat a rightful claim." *Contractors Heating & Supply Co.*, 163 Colo. 584, 432 P.2d 237, 239 (1967). As part of or in connection with this inquiry, the Court also considers whether an equitable result will be achieved by disregarding the entity form and holding a member or other insider personally liable for the acts of the entity. *In re Phillips* supra; *Sheffield* supra; *see also Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485, 490 (Colo. App. 2001)("[p]iercing the corporate veil is an equitable remedy, requiring balancing of the equities in each particular case").

Theriault argues that the texts in Exhibit 7 establish that Top That was not aware of Travelers' estimate until August 10, 2017. It was only then that Theriault, acting on an honest belief that, given Travelers' estimate and Armbrust's insistence, he "didn't want to be out of pocket," offered an alternative of roof repair and coating for the amount Travelers paid. Thus, Theriault argues, he did not knowingly participate or approve of any misrepresentations to Plaintiff, because there were none.

Yet the Court has found, and finds again by a preponderance of the evidence for purposes of piercing the entity veil in this case, that the agreement at issue took place on August 9, 2017. At that meeting, Armbrust, on behalf of 4240, contracted with Top That, through Theriault and DeGroot, to tear off the original roof and replace it with a new roof system for the price of $143,635.63. The record shows, and the Court finds,

that Armbrust dealt with Theriault, DeGroot, and Top That in good faith. The Court finds that Theriault and DeGroot knew they could not replace Plaintiff's roof at that price, given their previous estimate (Ex. 3), but were directly involved in misleading Armbrust that they would do so, intending instead to only patch and coat the roof, and thereby failing to disclose material facts. The Court finds that Exhibit 5 was partially manufactured by Defendants when they were pressed to provide an invoice for their work; that Armbrust based his decision to contract with Top That on representations made by Theriault and DeGroot; that Theriault was able to obtain $143,635.63 from Plaintiff by portraying himself and Top That as capable of performing a replacement of 4240's roof; and that he "grossly overcharged" Plaintiff for the actual work of patching and sealing the roof.

As such, the Court determines that justice requires the entity form be disregarded and the substance of the relationship between Top That and Theriault be recognized because the entity form was employed to perpetrate a fraud. Recognition of the entity's separate status would be grossly inequitable, and would effectively reward Theriault for his misrepresentation, concealment and bad faith.

Theriault is therefore personally liable to Plaintiff to the same extent as the entity as to the tort claims. *See In re Phillips*, supra at 644 (veil piercing "imposes liability on individual shareholders for the obligations of the corporation"). Moreover, personal liability is appropriate because Theriault was directly involved through conception or authorization, as well as through active participation or cooperation, specific direction, or sanction of the tortious conduct claimed by Plaintiff. *See Hoang v. Arbess*, 80 P.3d 863, 868 (Colo. App. 2003) ("To be found personally liable to third persons for a tort, the officer of a corporation must have participated in the tort . . . At a minimum, personal liability attaches to a defendant who was directly involved in the conduct through conception or authorization.").

B. Defendants Top That and Theriault's Motion to Require Plaintiff to Make an Election of Remedies

On August 11, 2021, Defendants filed a Motion to Require Plaintiff to Make an Election of Remedies. Plaintiff filed a Response on August 27, 2021, and Defendants filed a Reply on September 3, 2021.

The doctrine of election of remedies is "designed to prevent double recovery by requiring a party to make an election when the remedies sought are inconsistent and contradictory." *Singer v. Strauss*, 851 P.2d 256, 258 (Colo. App. 1993). However, the doctrine is inapplicable where the parties seek only one remedy. *Id.*

Here, Plaintiff originally sought:

> (1) [A]n award of damages sufficient to make 4240 Kipling, LLC whole, as requested in the First, Second, Fourth and Fifth Claims for relief, and as alternatively requested in the Third Claim for Relief;
>
> (2) Specific performance of the contract, as requested in the Third Claim for Relief;
>
> (3) Alternatively rescission of the contract represented by Exhibit 4, as requested in the Sixth Claim for Relief

Amended Complaint, September 6, 2019 at 23.

However, in Plaintiff's Closing Argument, they withdrew their request for specific performance. *See* Plaintiff's Closing Argument, July 29, 2021 at 7 ("In light of Top That's bankruptcy, 4240 withdraws its request for specific performance and requests monetary damages.").

Therefore, Plaintiff is not seeking double recovery as they have, from the beginning, clearly pleaded recession of the contract as an alternative to affirmation of the contract. To the extent that Plaintiff's alternative theories of recovery could be considered an attempt at a double recovery and bared by the election of remedies, the Court strikes the alternative claims five and six.

IV. CONCLUSIONS OF LAW AND ANALYSIS

A. Liability

1. First Claim for Relief: Deceit Based on Fraud – False Representation

The elements for Deceit based on fraud – false representation, are:

1. The defendant made a false representation of a past or present fact;

2. The fact was material;

3. At the time the representation was made, the defendant:

(a) knew the representation was false; or

(b) was aware that he did not know whether the representation was true or false;

4. The defendant made the representation with the intent that the plaintiff would rely on the representation;

5. The plaintiff relied on the representation;

6. The plaintiff's reliance was justified; and

7. This reliance caused damages to the plaintiff.

CJI-Civ. 19.1 (2021); *see also Bristol Bay Productions*, *LLC v. Lampack*, 312 P.3d 1155, 1160 (Colo. 2013) (wherein the Colorado Supreme Court cites to Colorado's Model Jury Instructions for the elements of deceit based on fraud – false representation).

Here, Defendants made a false representation of a past or present fact—that Defendants would replace Plaintiff's roof. That fact was material; Plaintiff hired Defendants to replace the roof. At the time Defendants made that representation, they knew the representation was false; they intended instead to put a silicon spray coating over the existing roof. Defendants made that representation with the intent that Plaintiff would rely on the representation, since Plaintiff's intended to have their roof replaced, not recoated. Plaintiff indeed did rely on that representation and hired Defendants to replace the roof. Plaintiff's reliance was justified, since Defendant DeGroot was a friend of Armburst and Defendants held themselves out as professionals. Plaintiff's reliance on that representation caused damages—Plaintiff paid for a new roof and instead received a spray coating of inferior quality. As a result, Plaintiff still requires a new roof.

2. Second Claim for Relief: Deceit Based on Fraud – Nondisclosure or Concealment

The elements for Deceit based on fraud – nondisclosure or concealment, are:

1. The defendant concealed or failed to disclose a past or present fact;

2. The fact was material;

3. The defendant concealed or failed to disclose it with the intent of creating a false impression of the actual facts in the mind of the plaintiff;

4. The defendant concealed or failed to disclose the fact with the intent that the plaintiff take a course of action he might not take if he knew the actual facts;

5. The plaintiff took such action or decided not to act relying on the assumption that the concealed or failed to disclose fact did not exist or was different from what it actually was;

6. The plaintiff's reliance was justified; and

7. This reliance caused damages to the plaintiff.

CJI-Civ. 19.2 (2021); *see also Baker v. Wood, Ris & Hames, Professional Corporation*, 364 P.3d 872, 883 (Colo. 2016).

Here, the facts demonstrate that Defendants made an overt misrepresentation to Plaintiff. In the alternative, the Court could find Defendants responsible based on a theory of nondisclosure or concealment, based upon Defendants failure to disclose to Plaintiff that the work Defendants would perform would not be the same as a total roof replacement. That fact was material, and Defendants intended for Plaintiff to believe that Plaintiff was receiving a new roof, as evidenced by the credible testimony of Armbrust and other evidence, such as the text messages. Armbrust believed he was receiving a new roof and hired Defendants as a result of that assumption. As noted above, Plaintiff's reliance was justified, and the reliance caused damages.

3. Breach of Contract

The elements for breach of contract are:

1. The Defendants entered into a contract with the Plaintiff to replace Plaintiff's roof for $143,635.83, to be paid by Plaintiff's insurer; and

2. The Defendants failed to replace Plaintiff's roof; and

3. The Plaintiff "substantially performed" the acts necessary for Defendants to receive the payment of $143,635.83

CJI-Civ. 30:10; *see also McDonald v. Zions First National Bank, N.A.*, 348 P.3d 957, 965 (Colo. App. 2015).

Here, Defendants entered into a contract with Plaintiff to replace Plaintiff's roof for $143,635.83, the amount Plaintiff's insurer was willing to pay. Defendants failed to replace Plaintiff's roof; rather, they made substandard, partial repairs, and applied a silicon spray coating. Plaintiff took all the steps necessary for Defendants to receive payment from Plaintiff's insurer.

4. Unjust Enrichment

The elements of unjust enrichment are:

1. At Plaintiff's expense;

2. Defendants received a benefit; and

3. Under circumstances that would make it unjust for defendant to retain the benefit without paying

Robinson v. State Lottery Div. 179 P.3d 998, 1007 (Colo. 2008).

Here, Plaintiff paid/signed over their insurance proceeds to Defendants in the amount of $143,635.83. In return, Defendants applied a silicon spray coating to Plaintiff's roof. Defendants' application of the silicon spray was a "shoddy job" and could not be salvaged. A similarly situated private company would have only charged $88,500 for a silicon spray coating and would have provided a superior quality of work

than what Defendants provided. Additionally, an insurance company would have only paid between $60,000 and $70,000 for a silicon spray coating.

Therefore, Defendants were overpaid by between 162% and 240% for a "shoddy job" that could not be salvaged. Moreover, the improper application of the silicon spray coating rendered it useless. These circumstances make it unjust for Defendants to retain the benefit.

B. Damages

1. Fraud

The calculation for damages is the same for both the first and second claim. Common elements of all fraud actions are that the plaintiff justifiably relied upon the representation or the nondisclosure and that this reliance resulted in damages. *Nelson v. Gas Research Institute*, 121 P.3d 340, 344 (Colo. App. 2005). Such damages may include the value of the loss of the claimant's bargain. *Western Cities Broadcasting, Inc. v. Schueller*, 830 P.2d 1074, 1077 (Colo. App. 1991). The value of the loss of the claimant's bargain is "the difference between the value of benefits actually received under the contract and the value such benefits would have had if the false representations had been true." *Club Matrix, LLC v. Nassi*, 284 P.3d 93, 96 (Colo. App. 2011).

Here, Plaintiff received some replacement metal roofing and a silicon spray coating for the reminder of the roof. The replacement metal roofing was valued at $22,345.31. The silicon spray coating was valued between $60,000 and $88,500. However, the Court finds that the poor quality of workmanship in the installation of the silicon spray coating has rendered the silicon spray coating worthless. The evidence supports a finding that the silicon spray coating cannot be salvaged and that the roof must be torn off and replaced. Therefore, Plaintiff received $22,345.31 in benefits under the contract.

However, Defendants were contracted to provide a replacement roof. The replacement roof had a valuation of $310,350.57. And had the roof been replaced, Plaintiff would have been entitled to $31,000 in recoverable depreciation from their

insurer. Therefore, had Defendants replaced the roof, Plaintiff would have received a value of $341,350.57.

Therefore, the difference in the value is $319,005.26.

2. Breach of Contract

"Generally, the measure of damages for a breach of contract is the loss in value to the injured party of the other party's performance caused by its failure or deficiency, plus any other incidental or consequential loss caused by the breach, less any cost or other loss that the injured party has avoided by not having to perform. Where a breach results in unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, the injured party may recover damages based on "(a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him." *General Ins. Co. of America v. City of Colorado Springs*, 638 P.2d 752, 759 (Colo. 1981).

Here, the breach resulted in unfinished construction and the cost of completing performance is $310,350.57. Plaintiff needs a new roof; therefore, the cost of a new roof is not clearly disproportionate to the probable loss in value of the building having a roof in need of replacement.

3. Unjust Enrichment

The proper remedy for unjust enrichment is to restore the harmed party "to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its monetary equivalent." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008).

Here, Plaintiff paid Defendants $143,635.63 for a worthless silicon spray coating.

4. Pre-Judgement Interest

Plaintiff requests pre-judgement interest pursuant to C.R.S. § 5-12-102. That statute provides in relevant part "[w]hen money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized

by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date judgment is entered". C.R.S. § 5-12-102(1)(a).

Here, there has been no evidence that Defendants wrongfully withheld money or property. Plaintiff paid Defendants $143,635.63 to replace their roof. Defendants instead installed a silicon spray coating. There are no allegations that Defendants wrongfully withheld property; nor can it be said that Defendants wrongfully withheld money. Defendants were paid to do a job, then failed to perform the job.

Therefore, the Court finds that Plaintiff is not entitled to pre-judgement interest.

5. Post-Judgment Interest

Plaintiff requests post-judgement interest pursuant to C.R.S. § 5-12-106. This statute only applies once a case has been appealed by a judgment debtor. An appeal cannot take place until the Court issues the instant Opinion; therefore, the Court cannot award interest pursuant to C.R.S. § 5-12-106 in the instant Opinion.

V. CONCLUSION

The Court finds in favor of Plaintiff. The Court awards Plaintiff $319,005.26. Judgment is recoverable against Defendants Top That Commercial Roofing, Inc., Phil Theriault, and Timothy DeGroot. Defendants are jointly and severally liable in the amount of $319,005.26.

SO ORDERED: December 7, 2021

BY THE COURT:

ROBERT LOCHARY
District Court Judge